SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK, APPELLANT,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND CORNELL STEAMBOAT COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

FILED DECEMBER 8, 1953

Probable Jurisdiction Noted February 2, 1953

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEB. 9, 1953.

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY, a Corporation, South Bethlehem, New York, Plaintiff,

v.

THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants

COMPLAINT TO ENJOIN, SET ASIDE, ANNUL, AND SUSPEND AN ORDER OF THE INTERSTATE COMMERCE COMMISSION—Filed April 11, 1952

I

The above-named plaintiff brings this action under sections 316(a) and 17(9) of the Interstate Commerce Act (49 U.S.C. § 916(a) and 49 U.S.C. § 17(9)) and 28 U.S.C. § 1336, 1398, 2284, 2321-2325 and pursuant to section 10 of the Administrative Procedure Act (5 U.S.C. § 1009) temporarily to restrain, suspend and enjoin and permanently to enjoin, set aside, annul and suspend an order of October 18, 1951 of the Interstate Commerce Commission, by Division 4 thereof, as affirmed by an order of the Interstate Commerce Commission on reconsideration dated March 17, 1952.

II

Plaintiff is a corporation duly organized and existing under the laws of the state of New York and is engaged in performing a common carrier service by water between points in the New York Harbor and points along the Hudson River below and including Waterford, New York. This operation is authorized and carried on by plaintiff [fol. 2] pursuant to a certificate of public convenience and necessity issued to it by the Interstate Commerce Commission as the successor in interest to Joseph R. Hutton.

III

Plaintiff's predecessor in interest, Joseph R. Hutton, made an appropriate and proper application to the Interstate Commerce Commission pursuant to the provisions of 49 U.S.C. § 909(a) for a certificate of public convenience and necessity to continue his operation as a common carrier by water as of January 1, 1940. In due course, the Interstate Commerce Commission after a formal hearing issued to plaintiff's predecessor in interest a certificate of public convenience and necessity on July 17, 1942 authorizing operations as a common carrier by water in the transportation of commodities generally between points in the New York Harbor area, points on the Hudson River below its junction with the New York state barge canal, the New York state barge canal between the Hudson River and the Niagara including the Oswego branch and the Niagara River. This certificate became final and effective on and after October 5, 1942. (See Exhibit No. 1). Said certificate of July 17, 1942 did not specify the type of equipment plaintiff's predecessor was authorized to use and neither did said certificate specify the type of service plaintiff's predecessor was authorized to provide.

IV

Thereafter, on its own motion and without notice to plaintiff's predecessor in interest, the Commission by order dated March 7, 1944 reopened the earlier proceeding and vacated and set aside and revoked the earlier certificate of July 17, 1942 issued to plaintiff's predecessor in interest and in lieu thereof, issued an amended certificate dated March 7, 1944 and effective May 29, 1944, to plaintiff's predecessor authorizing operations as a common carrier by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels between the same [fol. 3] points as described in the earlier certificate of July 17, 1942 (See Exhibit No. 2). In due course this certificate was transferred to plaintiff herein modified only as to the scope of the territory authorized to be served (See Exhibit No. 3), and as such, plaintiff is the successor in interest to Joseph R. Hutton and is entitled to all right, title,

and interest in the certificate of plaintiff's predecessor in interest as is contemplated by 49 U.S.C. § 909(a).

V

In due course plaintiff filed a tariff with the Interstate Commerce Commission naming therein certain rates for the transportation of brick by tug and scow between certain named points on the Hudson River within the state of New York. Said tariff also made provision for allowances to shippers for furnishing any instrumentality used in such transportation service which allowances are permitted and authorized pursuant to the provisions of 49 U.S.C. § 914.

VI

Subsequently, a proceeding was instituted before the Interstate Commerce Commission to determine whether or not plaintiff was authorized to publish allowances pursuant to the provisions of 49 U.S.C. § 914 and if plaintiff was engaged in a type of operation commonly referred to as towing. Plaintiff contended before the examiner and Division 4 of the Interstate Commerce Commission that (1) plaintiff's certificate could not be revoked in any manner whatsoever; (2) that the Commission may not specify the type of equipment to be used by a water carrier operating pursuant to part III of the Interstate Commerce Act; (3) that the Commission's action in revoking, modifying and amending the certificate of plaintiff's predecessor in interest was illegal, unlawful and beyond the statutory power of the Interstate Commerce Commission; (4) that the Commission's order complained of herein was tantamount to a revocation or modification of the allowance provisions of [fol. 4] the Interstate Commerce Act (49 U.S.C. § 914); and (5) that the transportation practice complained of herein is intrastate commerce and beyond the jurisdiction of this Commission. Nevertheless, Division 4 of the Interstate Commerce Commission by its report and order dated October 18, 1951 and affirmed by the entire Commission by order dated March 17, 1952 (see Exhibit No. 4) held that plaintiff is engaged in performing the service of towage and that its tariff naming rates, charges and allowances in connection with said service should be cancelled on one

day's notice to the Commission and to the general public. Plaintiff specifically alleges and avers that the examiner's initial or recommended report and/or the report of October 18, 1951 of Division 4 did not contain findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact or law presented for consideration and determination by the plaintiff herein.

VII

The order of the Interstate Commerce Commission complained of herein will cause irreparable loss, injury and damage to plaintiff unless the effective date of said order is temporarily restrained, suspended, or enjoined until the final disposition of this cause by this honorable court. Neither of the defendants by law are responsible in damages for such loss or injury to the plaintiff if it is required to discontinue, suspend or abandon its present transportation services by the cancellation of the tariff provisions ordered by the Interstate Commerce Commission.

VIII

The order of October 18, 1951 by Division 4 as affirmed by the Commission's order of March 17, 1952 is unlawful and void for the reasons that:

(1) said order constitutes a revocation of plaintiff's certificate authorizing it to operate as a common carrier by water by non-self-propelled vessels with the use of separate towing vessels because said certificate does not re- [fol. 5] restrict plaintiff's use of towing vessels and non-self-propelled vessels in any manner whatsoever. The order of the Interstate Commerce Commission attempts to incorporate by reference in plaintiff's certificate a classification of water carriers which classification is not incorporated or referred to in plaintiff's certificate;

(2) Said order is predicated on the principle that the Commission may specify the service to be rendered in a certificate of public convenience and necessity issued under part III of the Interstate Commerce Act. Plaintiff avers specifically that said order of October 18, 1951 as affirmed by the order of March 7, 1952 is invalid, unlawful, and void, and constitutes an unreasonable, arbitrary and capricious

exercise of jurisdiction by the Commission in that said Commission is not permitted and authorized by the Interstate Commerce Act to specify the service to be rendered or the type of equipment to be used by a common carrier by water;

(3) the Commission's action in revoking, modifying and setting aside the certificate of plaintiff's predecessor in interest of July 17, 1942 was and is not authorized or permitted by the Interstate Commerce Act applicable to water carriers and its action in that regard was without authority in law and was unlawful and void;

(4) said order in effect revokes the allowance provisions of the Interstate Commerce Act (49 U. S. C. § 914) in that the Commission's order is impossible of performance. Plaintiff avers that the Commission is without authority in law to promulgate an order such as the one complained of herein which results in a modification of a separate provisions of the Interstate Commerce Act by interpretation or otherwise;

(5) that the Commission's order is unlawful, void, arbitrary and capricious because it violates section 8(b) of the Administrative Procedure Act (5 U. S. C. § 1007(b)) in that the Commission and its examiner failed and refused to make required rulings and to state its reasons or basis [fol. 6] upon each finding, conclusion, and exception presented by plaintiff upon material issues. Plaintiff further avers that the Commission is without authority in law to promulgate the order complained of herein for the reason that the transportation activity of plaintiff is in intrastate and not subject to the jurisdiction of the Interstate Commerce Commission.

For all of the foregoing reasons, the said order complained of is unlawful, void, arbitrary and capricious.

Wherefore, the plaintiff prays:

(1) that a court, consisting of three judges constituted as required by 28 U. S. C. § 2284 be convened; and that process and notice be given the defendants;

(2) that a judge of such Court issue a temporary restraining order against the effectiveness of the Commission's order of October 18, 1951, as affirmed by order of

March 17, 1952, to prevent the irreparable damage specified in paragraph VII above;

(3) that an interlocutory order or injunction suspending or restraining the enforcement, operation and execution of said order of the Commission be entered by the Court, pending final determination of this action;

(4) that, upon final hearing, the Court adjudicate, order and decree that the decision and order of October 18, 1951 and the order of March 17, 1952 of the Interstate Commerce Commission, and each of them, are unlawful, null and void and that they be annulled and set aside; that their operation, execution, and enforcement be forever enjoined; and that the defendants, their officers and agents, and others acting for them, be perpetually restrained and enjoined from taking any steps or instituting any action to enforce said decision and orders and each of them;

(5) that plaintiff be given such other, further, and general relief as may be equitable and proper in the premises.

Thomas W. Cantwell, 75 State Street, Albany, New York, Counsel for Plaintiff.

Of Counsel: James E. Wilson, De Sales Building, Washington, D. C.

[fol. 7] *Duly sworn to by Keith M. Callanan. Jurat omitted in printing.*

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[fol. 8] EXHIBIT No. 1 TO COMPLAINT

This report will not be printed in full in the permanent series of Interstate Commerce Commission Reports

INTERSTATE COMMERCE COMMISSION

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

Submitted December 15, 1941. Decided July 17, 1942

1. Applicant's operation found to be that of a common carrier.

2. Public convenience and necessity found to require operation by applicant as a common carrier by water in the transportation of commodities generally between points on New York Harbor, points on the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River including the Oswego branch, and the Niagara River. Certificate issued, and application in all other respects denied.

Richard F. Lenahan for applicant.

Robert D. Brooks, Grover R. James, and Richard Barnes for interveners.

R. W. Snow for Interstate Commerce Commission.

REPORT OF THE COMMISSION

Division 4, Commissioners Porter, Mahaffie, and Miller

By Division 4:

By application filed May 31, 1941, Joseph R. Hutton, an individual of Kingston, N. Y., seeks a permit under section 309(f) of the Interstate Commerce Act authorizing continuance of operation as a contract carrier by water, in interstate or foreign commerce, in the transportation of commodities generally, except package freight and perishable goods, between points on Long Island Sound, New York Harbor, Hudson River, New York State Barge Canal System, Niagara River, and contiguous ports. The application is in the alternative, and requests a certificate if applicant is found to be a common carrier. Rail carriers operating in official territory intervened at the hearing. No one opposed the application.

[fol. 9] Applicant has been in operation for 37 years. He owns and manages 1 steam power boat of about 240 horsepower, and 4 barges, all of which are operated as a unit. The power boat is used to tow the barges but also carries about 150 gross tons of freight. On occasion other barges are rented or chartered for operation in applicant's fleet.

A schedule of minimum charges filed by applicant applies on about 35 commodities. During the 1939 and 1940

seasons, waste paper, phosphate rock, wheat, corn, barley, flaxseed, sand, steel billets, pig iron, scrap iron, fertilizer, and superphosphate were transported between points on New York Harbor, the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Niagara River and the Hudson River including the Oswego branch, and the Niagara River. At an undisclosed time prior to 1939, applicant transported pig iron to Bridgeport, Conn., and grain to Port Jefferson, N. Y.

Applicant claims the status of a contract carrier but all transportation performed during 1939 and 1940 was obtained through brokers who act as applicant's agents and hold themselves out to the general public. We conclude that applicant's operation has been that of a common carrier of commodities generally between points on New York Harbor, the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River including the Oswego branch, and the Niagara River.

Under the act, if a carrier was in bona fide operation as a common carrier on January 1, 1940, and has so operated since that time, we are authorized to issue a certificate without requiring further proof that public convenience and necessity will be served. As previously shown, applicant's operation through the 1940 season was that of a common carrier. For the 1941 season, however, applicant chartered his entire fleet of vessels to one shipper, thereby interrupting his operation as a common carrier. Applicant intends to resume his normal operation in 1942.

Applicant has been in operation for 37 years and his ancestors conducted the operation prior thereto. This long continued successful operation together with the evidence of record warrants a finding that public convenience and necessity will be served by such operation.

We find that applicant is a common carrier by water; that public convenience and necessity require operation by applicant as a common carrier in interstate or foreign commerce, of commodities generally, between points on New York Harbor as determined in Ex Parte No. 140, points on the Hudson River below its junction with the New York

State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River including the Oswego branch, and the Niagara River; that applicant is fit, willing and able properly to perform said transportation, and that applicant is entitled to a certificate authorizing such operation, subject, however, to general conditions which are necessary to carry out, with respect to such operation, the requirements of Part III of the act and the orders, rules, and regulations of the Commission thereunder.

The application, except to the extent herein granted, will be denied.

An appropriate certificate and order will be issued.

[fol. 10]

CERTIFICATE AND ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 17th day of July, A. D. 1942.

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

Joseph R. Hutton, an individual of Kingston, N. Y., having filed an application under the provisions of section 309 of the Interstate Commerce Act for a permit authorizing continuance of his operation as a contract carrier by water, or in the alternative for a certificate authorizing continuance of his operation as a common carrier, a hearing having been held, and full investigation of the matters and things involved having been made, and said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is hereby certified, That public convenience and necessity require operation by applicant as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally between points on New York Harbor as determined in Ex Parte No. 140, points on the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal be-

tween the Hudson River and the Niagara River including the Oswego branch, and the Niagara River.

It is ordered, That said applicant be, and it is hereby, authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That said application, except to the extent granted herein, be and it is hereby, denied.

And it is further ordered, That this certificate and order shall take effect and be in force from and after October 5, 1942.

By the Commission, division 4.

(S.) W. P. Bartel, Secretary. (Seal of Commission)

[fol. 11] EXHIBIT No. 2 TO COMPLAINT

ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 7th day of March, A. D. 1944.

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing:

It is ordered, That said proceeding be, and it is hereby, reopened for reconsideration.

By the Commission, division 4.

(S.) W. P. Bartel, Secretary. (Seal).

[fol. 12] EXHIBIT NO. 2 TO COMPLAINT

This report will not be printed in full in the permanent series of the Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

Decided March 7, 1944

Upon reconsideration, findings in prior report of July 17, 1942, modified by specifying the type of vessels to be used in the exercise of the authority granted in the certificate and order issued with the prior report. Amended certificate and order issued, and application in other respects denied.

Appearances as shown in proper report.

REPORT OF THE COMMISSION ON RECONSIDERATION

Division 4, Commissioners Porter, Mahaffie, and Miller

By Division 4:

With our prior report of July 17, 1942, we issued a certificate and order which became effective on October 5, 1942, authorizing Joseph R. Hutton to continue operation as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally between points in New York Harbor as determined in Ex Parte No. 140, points on the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River, including the Oswego branch, and the Niagara River.

In our prior report we did not specify the type of vessels to be used by applicant in the exercise of the authority granted. We have, therefore, reopened this proceeding upon our own motion for the purpose of giving further consideration to this matter. The facts stated in our prior

report will be repeated only to the extent necessary for clarity of discussion.

In the absence of any limits in the certificate with respect to the type of vessels to be used in the performance of the transportation authorized, applicant would be free to extend its operations and perform services different from those performed by him on and since the statutory date. He would thus be in a position to enter into new fields of transportation without first establishing, in accordance with the provisions of the Interstate Commerce Act, that such extension of his services is required by the present or future public convenience and necessity or is consistent with the public interest and the national transportation policy declared in the act. For these reasons we will modify the authority previously granted by specifying the types of vessels operated by applicant on and since January 1, 1940.

On and since January 1, 1940, applicant has been engaged in a common carrier operation by the use of one steam power boat of about 240 horsepower, and four barges, all of which are operated as a unit. The power boat is used to tow the barges, but it also has a cargo-carrying capacity of about 150 gross tons.

[fol. 13] Upon reconsideration, we find that on and since January 1, 1940, Joseph R. Hutton has been engaged in operation as a common carrier by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined in our order of March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous Thereto*, points on the Hudson River below its junction with the Erie Canal of the New York State Canal System, the Erie and Oswego Canals of the New York State Canal System, and the Niagara River, and in other respects we adopt our findings in the prior report. For the reasons stated above and in the prior report, the application, except to the extent herein granted, will be denied.

An appropriate amended certificate and order will be issued.

[fol. 14] EXHIBIT No. 2 TO COMPLAINT

AMENDED CERTIFICATE AND ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 7th day of March, A. D. 1944.

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

The record in this proceeding having received further consideration, and said division, on the date hereof, having made and filed a report on reconsideration containing its findings of fact and conclusions thereon, which report, together with the prior report of July 17, 1942, is hereby referred to and made a part hereof:

It is hereby certified, That public convenience and necessity require the continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined by the order of the Commission, division 4, entered on March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous Thereto,* points on the Hudson River below its junction with the Erie Canal of the New York State Canal System, the Erie and Oswego Canals of the New York State Canal System, and the Niagara River.

It is ordered, That said carrier be, and it is hereby, authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That said application, except to the extent granted herein, be, and it is hereby, denied.

And It is further ordered, That the certificate and order issued on July 17, 1942, be, and it is hereby, superseded and canceled as of the date on which this amended certificate and order takes effect; and that this amended certificate and order shall take effect and be in force from and after May 29, 1944.

By the Commision, division 4.

(S.) W. P. Bartel, Secretary. (Seal of the I. C. C.)

[fol. 15] EXHIBIT No. 3 TO COMPLAINT

This report will not be printed in full in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 15669[1]

JOSEPH R. HUTTON CERTIFICATE TRANSFER

Submitted May 26, 1947. Decided August 18, 1947

Transfer to the Callanan Road Improvement Company of the amended certificate dated March 7, 1944, issued to Joseph R. Hutton in Docket No. W-103, to the extent that such certificate authorizes operation on the Hudson River between Waterford, N. Y., and points on New York Harbor and harbors contiguous thereto, and intermediate points, approved. Regulation prescribed.

James E. Wilson for applicants.

J. Agnew Myers, Jr., for protestant.

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[1] And, for the purpose of giving effect to the determination herein, No. W-103, Joseph R. Hutton Contract Carrier Application.

REPORT OF THE COMMISSION.

Division 4, Commissioners Mahaffie, Miller, and Mitchell

By Division 4:

Margaret K. Hutton, administratrix of the estate of Joseph R. Hutton, and The Callanan Road Improvement Company jointly applied on April 1, 1947, for approval under section 312 of the Interstate Commerce Act of transfer by the administratrix, hereinafter sometimes referred to as the transferor, to the Callanan company, later herein generally called the transferee, of the amended certificate dated March 7, 1944, issued to the decedent in Docket No. W-103. A protest was filed by the Northeastern Inland Waterways Association, a hearing was held, and the case was argued orally before the examiner. No representations have been made by State authorities.

Initially, in No. W-103, we issued a certificate dated July 17, 1942 authorizing Hutton to operate as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally on the waters and between the points therein specified, *Joseph R. Hutton Contract Carrier Application*, 250 I. C. C. 804. On reconsideration, we modified the findings in our initial determination by specifying also the types of vessels to be used in the operation so authorized, and issued the amended certificate accordingly, *Joseph R. Hutton Contract Carrier Application*, 260 I. C. C. 804.

[fol. 16] The amended certificate authorizes operation as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined by our order dated March 26, 1941, in Ex Parte No. 140,[2] and points on the Hudson River below its junction[3] with the Erie Canal of the New York State Canal

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[2] Determination of the Limits of New York Harbor and Harbors Contiguous Thereto.

[3] At Waterford, N. Y., 3 or 4 miles north of Troy, N. Y., which is 8 or 9 miles north of Albany.

System, the Erie and Oswego canals, and the Niagara River.

Following a surgical operation performed in November 1944, Hutton died January 23, 1945. His widow was appointed administratrix of his estate by the Surrogate's Court of Ulster County, N. Y., on February 21, 1945, and, as such, is authorized to dispose of the estate's operating rights. She had nothing to do with the operation conducted by her husband, knows little about the business, and, for these reasons, has not attempted to continue his operation. Unable to conduct the business, her only recourse was to endeavor to dispose of the estate's water-carrier assets.

The business had been conducted for many years by Hutton, largely in person, and by his father and grandfather before him. In May 1941, when his application in No. W-103 was filed, he owned a steam-powered canal boat and 3 barges. He sold the power boat later in 1941, with the expectation of obtaining another. Eventually this was prevented by the war emergency, but he continued operation with tugs chartered from the Haakonsen Towing Company, hereinafter called Haakonsen.

Inquiry with respect to sale of the vessels and operating rights was begun by the transferor promptly on February 22, 1945. Haakonsen proposed to buy this property, and paid a cash deposit on the boats with the understanding that the remainder of the purchase price would be paid when the certificate was tranferred. We are informed that Haakonsen is engaged in the business of chartering floating equipment to others. Transfer of the certificate to Haakonsen never was proposed to us and, while the transferor testified that Haakonsen operated the barges during the summer of 1946, it seems probable that the vessels were operated by others under charter. The transferor was not in close touch with the situation, the affairs of the estate being left to her attorney. Two or three weeks before the hearing, the barges were sold at foreclosure, with the result that the estate received from that asset net proceeds of about $700.

On February 24, 1947, an officer of the transferee reported to that party's directors that negotiations with the transferor had led to an offer to sell the operating rights

for $2,750. This offer was accepted, and on March 21, 1947, the transferor and the transferee entered into a written agreement for such sale, subject to approval by us of transfer of the related certificate.

[fol. 17] The transferee, incorporated in New York in 1895, is not a carrier subject to part III of the act, and is not affiliated in any way with any subject carrier. It is authorized by its charter to own or lease vessels, and to do a towing business. It is engaged, among other things, in the production of road-building material (crushed stone, slag, and asphaltic products) and agricultural limestone, and in highway construction. It owns a quarry at South Bethlehem, N. Y., about 5 miles inland, and since 1937 has had a stone-crushing plant at Kingston, N. Y., on Rondout Creek, a tributary of the Hudson. It began shipping crushed stone by water in 1930, with chartered scows towed under contract. This service becoming unsatisfactory, the transferee bought a Diesel tug in the summer of 1946 and, since that time, has tranported its crushed stone and gravel on the Hudson, using from 15 to 25 scows under long-term charter arrangement.

The transferee's balance sheet as of January 1, 1947, shows assets aggregating $1,014,561 and, on the liability side, accounts and notes payable $523,900 capital stock $80,500, and corporate surplus $410,161. In 1946, the company earned net income amounting, after taxes, to $33,493. It presently employs about 300 persons. Its officers have had experience in transportation activities since 1931, and its New York City and Kingston agents have performed the details of dispatching vessels for several years.

In testimony for the protestant, mention is made of other carriers having authority to perform towage along the Hudson River, namely: Russell Bros. Towing Co.,[4] the Shamrock Towing Co., Inc., a contract carrier,[5] and the McCarren Towing Line, Inc.[6] The transferee comes in contact with only one, the Cornell Steamboat Company,

[4] 250 I. C. C. 429.

[5] 250 I. C. C. 788.

[6] 250 I. C. C. 68.

that handles brick, pig iron, and cement on the river between Waterford and New York City, and it was unsatisfactory service by this carrier that led the transferee to provide its own tug. When the transferee began its own operation, it was approached by other shippers with requests that the transferee also transport for them nonexempt commodities from Hudson River points, including Kingston and Coeymans, N. Y., to New York City. The transferee expects to operate successfully because the situation as to service affords an opportunity to demonstrate the possibilities of operation with modern equipment. It is interested, also, in obtaining additional business, and in operating its vessels as economically as possible.

The transferee intends to publish a tariff establishing rates for the transportation of brick, pig iron, and possibly cement. It would continue to handle its own business, with the freight of other shippers intermingled in tows, but it intends, irrespective of the exigencies of its own business, to move its revenue freight promptly in order to satisfy shipper requirements. If the revenue traffic is sufficiently profitable, it probably will add to its equipment. Additional tugs will be available as soon as transfer of the certificate is approved.

[fol. 18] The transferee is interested primarily in operation on the Hudson between Waterford and New York City. Its intentions with respect to operation beyond Waterford, on the State canals, are contingent and uncertain. It admits that, without expensive changes, its tug would not be suited to canal operation because of bridges and other obstructions. It has not been approached by shippers there and has made no serious investigation as to prospective business of that territory. While it desires to have the right to operate beyond Waterford, it would be satisfied to have the right to operate on the river between that point and New York Harbor and adjacent waters.

The protestant is an association of water carriers having members of three classes, including a division operating on the New York State Canal System and a general towing division. The association was represented at the hearing by its president, who is also president of one of the carrier members. He contends that the transferee is

primarily an industrial (or private) carrier, and that there now is a dearth of tonnage on the canals. That business appears to be the protestant's primary concern in this proceeding; and its objection to the proposed transfer herein would be largely satisfied by limitation of the superseding certificate to the river operation and to the commodities which the transferee expects to transport.

Hutton was a member of the association, and the association was aware of his illness and death. The witness expresses sympathy with the widow's problem, and disappointment with failure of the deal with Haakonsen, but the association heretofore has proferred her no assistance. It is stated that one or more operators on the canals who have not received certificates would be interested in acquiring the transferor's rights, but no counter proposal is offered or suggested. Yet the protestant argues that the transferor's failure to operate and furnish service after Hutton's death was due to laxness and neglect, and that this is tantamount to abandonment of his operation.

Abandonment of operation connotes cessation of service, or long disuse of facilities, coupled with the intention that such service or use of facilities shall not be resumed, *Akron & B. B. R. R. Co. Abandonment of Operation*, 239 I. C. C. 250, 254. Any such intention on the transferor's part is clearly negatived by the facts. The record shows that the transferor is anxious to settle the estate and provide for resumption of service by effecting a transfer of operating rights to one who will continue the operation, and that she has exerted every effort to that end within her power. Delay in accomplishing a sale was due to failure of the transaction previously arranged and failure of any others to manifest any interest in the matter until a willing buyer had been found. The record impresses us that, if the protestant did not indulge the expectation or hope that competition might be reduced through lapse of Hutton's certificate, at least it pursued with respect thereto the course of laissez faire. We are of the opinion, and find, that the suspension of operation under the amended certificate was caused by circumstances over which the transferor had no control, within the meaning of section 306.9 of the transfer rules and regulations prescribed by us pursuant to the provisions of section 312.

[fol. 19] The past operations of the transferor's predecessor are some evidence that the operation has served a useful purpose, and the record shows prospective patronage of the service as proposed to be resumed by the transferee. Consequently, we think that operation by the transferee will be consistent with the public interest, but we will prescribe the rule or regulation that the transferee shall maintain completely separate records and accounts for its private operation and for its common carrier operation.

The protestant contends that we erred in amending the certificate issued intially to Hutton by including self-propelled vessels in the types of equipment specified, and that the use of self-propelled vessels now should be eliminated. Counsel for the applicants points out that the certificate may not be attacked collaterally in this proceeding, and contends that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation in whole or in part, citing *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424.

We think that any certificate may be revoked, canceled, or modified with the holder's consent. The present holder's interest in the amended certificate is to sell the operating rights thereby evidenced. Limitation of the certificate to authorize only the operation on the Hudson River will not defeat that transaction; and, if the transfer is approved, the transferee will become the potential holder. The transferee does not object to limitation of the certificate to the river operation, and has no present intention of reselling the operating rights it has contracted to purchase. Since the transferee has no definite purpose to operate on the canals and Niagara River, we shall not authorize it to do so. Accordingly, the authority contained in the superseding certificate to be issued herein will be limited to the river operation.

We find that The Callanan Road Improvement Company is fit, willing, and able properly to perform the common carrier service on the Hudson River between Waterford, N. Y., and points on New York Harbor and harbors contiguous thereto, and intermediate points, that transfer to The Callanan Road Improvement Company of the amended

certificate dated March 7, 1944, issued to Joseph R. Hutton in No. W-103, insofar as such certificate authorizes the above-described operation, is consistent with the public interest, and that, if sale of the transferor's operating rights to the transferee is consummated, the latter will be entitled to a certificate authorizing it to perform that service. Upon receipt of notice that such sale has been consummated, a certificate superseding the amended certificate will be issued to the transferee.

Our findings herein contemp-ate that the transferee, before recording in its books acquisition of the operating rights of the transferor, first will submit the related journal entries for approval by us. Our policy with respect to amortization or writing off to proprietorship capital accounts of intangible property is discussed in *E. L. Skeel—Purchase—Jess Kuhns and Grays Harbor Lines, Inc.*, 40 M. C. C. 318.

An appropriate order will be entered.

[fol. 20] ORDER

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of August, A. D. 1947.

Finance Docket No. 15669

JOSEPH R. HUTTON CERTIFICATE TRANSFER

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

Investigation of the matters and things involved in these proceedings having been made, a hearing having been held, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That, for the purpose of giving effect to the determination herein, the proceeding in No. W-103 be, and it is hereby reopened.

It is further ordered, That transfer to The Callanan Road

Improvement Company of the amended certificate dated March 7, 1944, issued to Joseph R. Hutton in No. W-103, to the extent that such amended certificate authorizes operation on the Hudson River between Waterford, N. Y., and points on New York Harbor and harbors contiguous thereto, and intermediate points, be, and it is hereby, approved.

It is further ordered, That, following consummation of the sale to the transferee of the operating rights covered by said amended certificate, said transferee may perform to the extent above described, the water-carrier service heretofore authorized under said amended certificate dated March 7, 1944, in No. W-103.

It is further ordered, That, within 20 days from and after consummation of said sale of operating rights, the transferee shall file with this Commission (1) a copy of the instrument by which said operating rights are conveyed to it, and (2) an opinion of counsel as to the fact of legal consummation of said sale.

And it is further ordered, That unless said sale is consummated on or before October 1, 1947, this order shall be of no further force or effect.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal).

[fol. 21] EXHIBIT NO. 4 TO COMPLAINT

Interstate Commerce Commission

No. W-103

Joseph R. Hutton Contract Carrier Application

Submitted July 12, 1951 Decided October 18, 1951

Petitioner, The Callanan Road Improvement Company, found to be engaged in the performance of towage service without appropriate authority, and rates, charges, and allowances made by it to shippers for the use of their own

scows in the performance of towage found to be unlawful and required to be canceled. Proceeding discontinued.

James E. Wilson for petitioner.

R. Granville Curry, Frederick M. Dolan, Paul L. Clugston, Reginald G. Narelle, Howard B. Harte, and Gerald M. McAllister for protestant and interveners.

Clemens F. Rauth for Interstate Commerce Commission.

Report of the Commission

Division 4, Commissioners Mahaffie, Rogers, and Mitchell

By Division 4:

Exceptions to the examiner's proposed report was filed by the petitioner, to which the protestant replied. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

This is a proceeding, pursuant to a petition of The Callanan Road Improvement Company, South Bethlehem, N. Y. (successor in interest to Joseph R. Hutton) called the petitioner, to determine whether certain of the petitioner's operations constitute freighting, a service which it is authorized to perform, or towing, a service which it is not specifically authorized to perform.

The Cornell Steamboat Company, Moran Towing & Transportation Company, Inc., McAllister Lighterage Line, Inc., and Card Towing Line, Inc., carriers that are authorized to perform towage on the Hudson River, and the Northeastern Inland Waterways Association, Inc., and the Canal Lakes Towing Company, Inc., intervened at the hearing in support of the complaint. The evidence in opposition to the petitioner was offered by the Cornell Steamboat Company, which will be referred to as the protestant. [fol. 22] In its exceptions to the examiner's report, the petitioner presents the following questions as determinative of the issue before us: (1) May a water carrier whose certificate specifies the service to be rendered by the use of non-self-propelled vessels with the use of separate tow-

ing vessels publish allowances for the use of its shippers' equipment even though the carrier does not specifically hold towing rights? (2) May the Commission by interpretation establish a principle which has the effect of modifying, restricting, or partially revoking a water carrier's certificate? And (3) is a water-carrier certificate which specifies the service to be rendered by describing the type of equipment to be used a valid exercise of the Commission's authority under part III of the act? It is the position of the petitioner that we are without authority to specify the service to be rendered in a water-carrier certificate, and that any effort on our part to do so exceeds our authority. The disposition of these general questions will be confined to the facts before us in this proceeding.

A brief summary of the character of the service which Joseph R. Hutton was authorized to operate under his certificate, and the circumstances and conditions under which the transfer of such authority was made to the petitioner, appears necessary to a proper determination of the issue.

On December 31, 1940, Joseph R. Hutton filed his application for exemption from regulation under the terms of section 303(e) of the act. Upon failure to establish such exemption, the application was denied on May 17, 1941. Upon his application for appropriate operating authority, it was found, after hearing, that applicant's operations were those of a common carrier by water in the transportation of commodities generally between points in New York Harbor, points on the Hudson River below its junction with the New York State Barge Canal, the New York State Barge Canal between the Hudson River and the Niagara River, including the Oswego branch, and the Niagara River. In accordance with the "grandfather" provisions of section 309(a), the applicant on July 17, 1942, was issued a certificate of public convenience and necessity authorizing continuance of his operations described of record as of January 1, 1940, subject, however, to such terms, conditions, and limitations as were attached to the exercise of the authority granted. *Joseph R. Hutton Contract Carrier Application*, 250 I.C.C. 804.

The applicant owned and managed one steam power boat of about 240 horsepower, and four barges, all of which were

operated as a unit. The power boat was used in towing the barges and constructed so as to carry also about 150 gross tons of freight. On occasions, other barges were rented or chartered for operations in the applicant's fleet. During the seasons of 1939 and 1940, waste paper, phosphate rock, wheat, corn, barley, flaxseed, sand, steel, billets, pig iron, scrap iron, fertilizer, and superphosphate were transported between points in New York Harbor, on the Hudson River below its junction with the New York State Barge Canal, and on the New York State Barge Canal between the Niagara River and the Hudson River, including the Oswego branch, and the Niagara River. As the applicant had been in bona fide operation as a common carrier on January 1, 1940, we were authorized to issue the certificate without requiring further proof that public convenience and necessity would be served thereby.

[fol. 23] Through inadvertence, the certificate and order did not define the conditions and limitations, including the nature of the services which would attach to and govern the carrier's operations. Section 304(c), among other things, authorizes us to establish from time to time such just and reasonable classifications of groups of carriers included in the term "common carrier by water" as the special nature of the services performed by such carriers shall require, together with such just and reasonable rules, regulations, and requirements consistent with the provisions of part III, which must be observed by the carriers so classified or grouped, as after hearing we find to be necessary or desirable in the public interest. Our practice in this respect is described in *Norfolk, Baltimore and Carolina Line, Inc., Ext.—James R.*, 265 I.C.C. 247, 253-4, affirmed, as to this matter, by the entire Commission, 265 I.C.C. 313, 314.

Subsequently, on reconsideration, the proceeding was reopened and division 4 modified the findings in the initial determination by specifying the types of vessels to be used, and issued an amended certificate and order effective May 29, 1944, which authorized Joseph R. Hutton to operate as a common carrier by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, between the same points as described in the certificate issued on July 17, 1942, which was superseded and canceled.

Joseph R. Hutton Contract Carrier Application, 260 I.C.C. 804.

Joseph R. Hutton died in January 1945, and his widow was appointed administratrix of his estate with authority to dispose of the estate's operating rights. Hutton sold his power boat in 1941, but continued operation with chartered tugs. In Finance Docket No. 15669, *Joseph R. Hutton Certificate Transfer* (not printed in full), 265 I.C.C. —, decided August 18, 1947, division 4 authorized the transfer of the estate's operating rights from the transferor, the widow, to the transferee, the petitioner herein, through the cancellation of the rights previously granted to the transferor and the issuance of an amended certificate and order to the transferee upon the consummation of the sale of the transferor's operating rights to the transferee. All of the former operating rights held by Hutton were not transfered to the petitioner. The division authorized the transfer only of that part of the certificate covering operations on the Hudson River between Waterford, N.Y., and New York, N.Y., subject to all of the conditions and limitations which attached to the Hutton rights.

In that proceeding the Northeastern Inland Waterways Association, intervener, contended that we erred in amending the certificate issued initially to Hutton by including self-propelled vessels in the types of equipment specified and that authority to use self-propelled vessels by Hutton should be eliminated from the certificate to be issued to the petitioner under the sale agreement. Counsel for the petitioner-applicant contended that the certificate could not be attacked collaterally in that proceeding, and further, that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation [fol. 23a] in whole or in part, citing *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424. The facts in the *Seatrain case* differ from those in the Hutton transfer proceeding, Finance Docket No. 15669. There was no consent of the parties in the *Seatrain case*. In the transfer proceeding the division stated its position in respect of the contentions there made in the following language, which we think is also pertinent here:

> We think that any certificate may be revoked, canceled, or modified with the holder's consent. The pres-

ent holder's interest in the amended certificate is to sell the operating rights thereby evidenced. Limitation of the certificate to authorize only the operation on the Hudson River will not defeat that transaction; and if the transfer is approved, the transferee will become the potential holder. The transferee does not object to limitation of the certificate to the river operation, and has no present intention of reselling the operating rights it has contracted to purchase. Since the transferee has no definite purpose to operate on the canals and Niagara River, we shall not authorize it to do so. Accordingly, the authority contained in the superseding certificate to be issued herein will be limited to the river operation.

On September 11, 1947, the transaction authorized in Finance Docket No. 15669 was consummated, and the bill of sale, properly notarized, was filed with us on September 19, 1947. On February 5, 1948, the transferor having assented to the partial cancellation of the amended certificate of March 7, 1944, and the transfer of her remaining operating rights to the transferee (petitioner herein), a second amended certificate and order were issued to The Callanan Road Improvement Company, under which the petitioner is authorized to operate as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined by the order of division 4, entered on March 26, 1941, in Ex Parte No. 140, Determination of the Limits of New York Harbor and Harbors Contiguous Thereto, and points along the Hudson River below and including Waterford.

The petitioner owns two towboats, one of 700 horsepower and the other of 150 horsepower. It charters a towboat of 805 horsepower and engages other towboats under so-called short charters as the exigencies of its business may dictate. In such cases the crews are furnished by the owners of the towboats, except that the petitioner selects the pilots who are paid by the owners of the tugs. All of the scows chartered and used by the petitioner are chartered with a captain.

[fol. 24] The petitioner, among other things, produces crushed stone at Kingston, N. Y., and transports such commodity down the Hudson River in its vessels for sale and delivery in the New York Harbor area. In the same tows in which the crushed stone is transported it operates as a carrier for hire in the movement of brick loaded on its deck scows or chartered scows, and on scows of the shippers for which it makes allowances in accordance with its tariff I.C.C. No. 2. The shippers' scows are furnished with a captain on board who is responsible to the shipper or owner of the scow and is paid by him.

No question is raised concerning the right of the petitioner to transport its own crushed stone, or to operate under its certificate as a common carrier in the transportation of brick with scows chartered or provided by it and not by the shipper. The protestant on May 11, 1949, complained to the Commission that the petitioner's tariff I. C. C. No. 2, which became effective on April 17, 1949, embodies rates which contemplate the service of mere towage, and that the performance of such service violates the petitioner's certificate authorizing the transportation of property by non-self-propelled vessels with the use of separate towing vessels (commonly referred to as freighting). On September 19, 1950, the Commission's Bureau of Water Carriers and Freight Forwarders informed the petitioner that, in view of the findings of division 2 in *Dixie Carriers, Inc., Rates and Allowances*, 278 I. C. C. 417, hereinafter called the *Dixie case*, it appeared that the service contemplated under allowances provided in its tariff would constitute towage, and that inasmuch as it was not authorized to engage in such service, the performance thereof would be unlawful. The petitioner replied on September 25, 1950, that it would be its purpose to conduct its operations in conformity with the determination in the *Dixie case* when the order therein became effective. On January 5, 1951, and after that order became effective on December 26, 1950, the petitioner filed the instant petition, requesting a statement of the Commission's position in a formal proceeding and a finding that the petitioner's present tariff provisions with respect to allowances are just and reasonable and that, under its certificate, it is legally authorized to publish and observe such provisions in its rela-

tions with shippers. It asked particularly for an opportunity to distinguish the facts to be presented from those in the *Dixie case*. Such an opportunity has been afforded the petitioner.

At the same time that the instant petition was filed, the petitioner also filed (1) a request for temporary authority under section 311(a) of the act, No. W-103 (Sub-No. 2), to perform general towage between points along the Hudson River; (2) an application under section 5 of the act, Finance Docket No. 17202, to purchase the Hudson River towage rights of L. B. Shaw, Inc.; and (3) an application under section 309(c) of the act, No. W-103 (Sub-No. 1), for a certificate of public convenience and necessity authorizing operation as a common carrier in the performance of general towage on the Hudson River. By order of January 31, 1951, the request for temporary authority was denied in that the petitioner had failed to show that there was no other carrier service capable of meeting the need for towage service between the points covered thereby. The remaining applications are pending.

[fol. 25] The petitioner's tariff I. C. C. No. 2, among other things, names commodity rates applicable on standard and oversize brick by tug and scow from Catskill Point, Coeymans, Glasco, Malden, and Roseton, N. Y., on the Hudson River, to a point in New York Harbor adjacent to the Statue of Liberty. These rates do not include insurance. The same rates also apply on the movement of brick in scows furnished by shippers, for which so-called allowances are made and the demurrage rules are inapplicable. When the petitioner is not required to return the shipper's scow light to point of origin, a "credit" or additional allowance is made. For example, the tariff provides a rate of $2.24 per 1,000 standard brick, minimum cargo 350,000, from Coeymans to the designated point in New York Harbor. For the use of the shipper's scow, the petitioner makes an allowance of 93 cents per 1,000 brick, which results in a net rate of $1.31 to the shipper and owner of the scow. In the event the petitioner does not return the empty scow to Coeymans, it makes a flat allowance or gives a credit to the shipper of $65. The credit varies with the distance the scow is towed light. While the petitioner's rates in con-

nection with the movement of brick have been reduced twice, the allowances or credits have remained unchanged.

There is no evidence that the petitioner transported any brick under the rates as originally published on April 17, 1949, or as reduced on June 26, 1949. Following the further reduction in the rates on March 26, 1950, in each month during the 1950 season of navigation on the Hudson River, from April to December, the petitioner moved a number of scowloads of brick from up-river points to New York Harbor, aggregating 407 scowloads for seven shippers. Except for 28 shipments handled in scows furnished by the petitioner, the scows used in the performance of this transportation were furnished by shippers of brick to whom it made allowances.

The protestant has been engaged in general towage on the Hudson River for many years. See *Cornell Steamboat Co. Contract Carrier Application*, 250 I. C. C. 577. Its certificate to operate as a common carrier by water is limited to that service only, while the petitioner's certificate, as above indicated, is limited to the performance of freighting service by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels. The transportation of property by a water common carrier by non-self-propelled vessels with the use of separate towing vessels, for the purpose of the voyage, is in effect service by one vessel or unit under the contract of affreightment. The service performed by towers falls within a classification distinguishable from that just mentioned. They propel vessels from place to place and, unless the transportation is exempt, are subject to our jurisdiction under part III. See *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634. The authority to perform such towage is not included in the authority granted to water carriers to engage in transportation of commodities by non-self-propelled vessels with the use of separate towing vessels.

[fol. 26] Prior to the 1950 season of navigation, the protestant provided towage for six of the brick shippers served by the petitioner in that year by the movement of their scows, loaded and light, on the Hudson River. The only other shipper served by the petitioner, Athens Brick Company, entered the business of manufacturing brick in

September 1950, as successor-in-interest to the Mayone Brick Company for whom the protestant had also provided towage service. The protestant's rates, like those of the petitioner, are in cents per 1,000 brick, and include the return of light scows to points of origin. Also, the petitioner's net rates, after the allowances made by it for the shippers' scows, are the same as the towage rates of the protestant. Within the period of a year, the rates of the two carriers were reduced an average of 21.5 cents per 1,000 brick. For example, in April 1949 the protestant's rate and the rate of the petitioner, after an allowance for the shipper's scow, from Glasco to New York Harbor, were $1.11. By April 13, 1950, both carriers had reduced these rates to 90 cents.

No bills of lading or shipping orders were or are issued by the petitioner in connection with the transportation of the shippers' scows loaded with brick. Nor are there any written agreements between the parties bearing on the use of such scows by the petitioner. Under the arrangements by which the scows are used the petitioner may not transport thereon the property of any shipper other than the one furnishing the vessel. More specifically, the petitioner may not load cargo on a shipper's scow for the return movement up the Hudson River after a shipment of brick has been discharged in New York Harbor.

The facts related do not differ materially from those in the *Dixie case*, wherein it was found that the transportation concerned was a towage service. The petitioner, while contrasting the circumstances in the two proceedings by an erroneous interpretation of the facts and findings in the *Dixie case*, contends that by reason of section 314 of the act it is permitted to make allowances for the use of the shippers' scows in the performance of a freighting service, citing *Campbell Transp. Co. Common Carrier Application*, 260 I. C. C. 107, 110. Therein, division 4 found that a carrier authorized to engage in the transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels is not prohibited from using shippers' barges as a part of its equipment in performing a complete freighting service, provided the arrangements for such use are reasonable and otherwise lawful.

In applying the principle laid down in the *Campbell case* to the facts in the instant proceeding, the present issue must be resolved by the test of whether shippers' scows are used as a part of petitioner's equipment or are received by it as a part of the consignment to be towed. On this point the record is clear. Petitioner's rates applicable to the movement of brick from up-river points to New York Harbor provide for the return of shippers' scows light to points of origin, and as hereinbefore stated, its published rules with respect to free time and demurrage are inapplicable when scows are furnished by shippers. In addition, peti- [fol. 27] tioner admits that it may not load a shipper's scow at New York for an up-stream movement in lieu of returning the vessel light to its owner at origin. The fact that a charge is made for return of the empty scow to point of origin indicates that its original tender to the carrier was as a part of the consignment to be towed. From these facts the conclusion is inescapable that the petitioner does not and may not utilize shippers' scows as a part of its own equipment, from which it follows that the transportation performed by the petitioner in connection with the movement of freight in shippers' scows constitutes a towage service.

As stated by division 2 in the *Dixie case*, the carriers whose certificates or permits do not specifically authorize them to perform the service of towage are without authority to engage in such service. On the record before us, we must find that since the petitioner has no authority for the maintenance of rates, charges, or allowances, such as those published in its tariff I. C. C. No. 2, applicable to towage, such rates, charges, and allowances should be cancelled.

We conclude that the petitioner has been and is performing the service of towage without appropriate authority therefor under section 309 of the act, and that the rates, charges, and allowances in its tariff I. C. C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful.

An order will be entered requiring the cancellation of the rates, charges, and allowances described, and discontinuing the proceeding.

Order

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 18th day of October, A. D. 1951.

No. W-103

Joseph R. Hutton Contract Carrier Application

It appearing, That by notice dated February 6, 1951, the Commission assigned for hearing the petition of The Callanan Road Improvement Company filed January 5, 1951, for interpretation of its certificate No. W-103, and for formal disposition of the Cornell Steamboat Company's complaint of May 11, 1949, concerning the alleged performance of unauthorized towage by The Callanan Road Improvement Company;

It further appearing, That full investigation of the matters and things involved has been made, and that division 4, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof;

It is ordered, That the petitioner herein, The Callanan Road Improvement Company, be, and it is hereby, notified and required, on or before November 24, 1951, upon notice to this Commission and to the general public by not less than one day's filing and posting in the manner prescribed in section 306 of the Interstate Commerce Act, to cancel the rates, charges and allowances described in said report and therein found to be unlawful;

And it is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 29] EXHIBIT NO. 4 TO COMPLAINT

Order

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 17th day of March, A. D. 1952.

No. W-103

Joseph R. Hutton Contract Carrier Application

Upon consideration of the record in the above-entitled proceeding, and of petition of The Callanan Road Improvement Company, successor in interest to Joseph R. Hutton, for reconsideration, and it appearing that the reasons set forth in said petition do not justify reopening the proceeding for reconsideration:

It is ordered, That said petition be, and it is hereby, denied.

By the Commission.

W. P. Bartel, Secretary. (Seal.)

[fol. 29a] [File endorsement omitted.]

[fol. 30] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER OF THE INTERSTATE COMMERCE COMMISSION—Filed June 7, 1952

The Interstate Commerce Commission, one of the defendants in the above-entitled proceeding, for answer to the complaint states:

I

The Commission admits, for the purposes of this action, the allegations of paragraphs I, II, III, IV and V of the complaint.

II

Answering paragraph VI, the Commission admits that the plaintiff herein, on January 5, 1951, petitioned the-

Commission to institute a proceeding to determine whether certain of plaintiff's operations constitute freighting, a service which plaintiff is authorized to perform, or towing, a service which it is not specifically authorized to perform; that such proceeding was instituted by the Commission on February 6, 1951, and was assigned for hearing and heard before an examiner of the Commission on February 23, 1951; that at said hearing a substantial volume of evidence, consisting of upwards of 150 pages of testimony and five documentary exhibits, was introduced by the parties, in-
[fol. 31] cluding the plaintiff herein, the Cornell Steamboat Company, and other protestants; that thereafter briefs were filed by the parties and, on May 28, 1951, an examiner's proposed report was issued and served, to which exceptions were filed by the plaintiff herein, and said exceptions were replied to by protestant Cornell Steamboat Company; that on October 18, 1951, Division 4 of the Commission (consisting of Commissioners Mahaffie, Rogers and Mitchell) issued and served upon the parties a report and order, *Joseph R. Hutton Contract Carrier Application*, 285 I.C.C. 75, a typewritten copy of which is attached to the complaint herein as Exhibit No. 4; that thereafter, on December 26, 1951, plaintiff filed a petition for reconsideration, which petition was replied to by protestant Cornell Steamboat Company, and said petition was denied by order of the entire Commission on March 17, 1952; that the effective date of said order of October 18, 1951, which was originally November 24, 1951, has subsequently been postponed from time to time until June 21, 1952.

III

Answering paragraphs VII and VIII, the Commission denies the allegations thereof and denies that its said orders of October 18, 1951, and March 17, 1952, are unlawful or void for the reasons, or for any reason, set forth in said paragraphs. The Commission denies that said orders will cause plaintiff irreparable loss, injury or damage or any legal injury.

Further answering subparagraph 3 of paragraph VIII, the Commission alleges that plaintiff may not in this proceeding collaterally attack the validity of the orders which

modified the certificate of July 17, 1942, issued to Joseph R. Hutton.

Further answering subparagraph 5 of paragraph VIII, the Commission alleges that plaintiff did not present to the Division or the Commission the issue of whether plaintiff's [fols. 32-33] activity was in intrastate commerce and consequently that issue is not one for initial determination by the Court.

IV

Except as expressly admitted herein, the Commission denies each of and all the allegations in said complaint to the extent that they are inconsistent with the aforesaid report and order of October 18, 1951, which said report and order are hereby referred to and made a part of this answer.

All of which matters and things the Commission is ready to aver, maintain and prove as this Honorable Court shall direct, and hereby prays that said complaint be dismissed.

Interstate Commerce Commission, By Edward M. Reidy, Chief Counsel; C. H. Johns, Attorney.

June 5, 1952.

[fol. 33a] [File endorsement omitted.]

[fol. 34] In United States District Court

[Title omitted]

Answer of the United States of America—Filed June 14, 1952

Now comes the United States of America, defendant, and for answer to the complaint of plaintiff filed in the above-captioned action admits, denies and avers as hereinafter set forth:

1. Answering the allegations of paragraph I, the United States admits that the Court has jurisdiction to entertain the action to set aside and enjoin an order of the Interstate

Commerce Commission determining the scope of plaintiff's authority to engage in the transportation of interstate commerce as a water carrier under a certificate of public convenience and necessity issued by the Commission. The United States denies the alleged application of Section 10 of the Administrative Procedure Act (5 U. S. C. 1009) to this action.

2. Answering the allegations of paragraph II, the United States admits that plaintiff is engaged in performing a common carrier service by water between points in the New York Harbor and points along the Hudson River below and including Waterford, New York, but for a complete statement of the scope of such authority respectfully invites the Court's attention to the certificate issued to plaintiff by the Commission.

[fols. 35-36] 3. Answering the allegations of paragraphs III to VI inclusive, the United States admits the occurrence of the various procedural steps in the administrative history of this action before the Commission but denies all inferences and conclusions drawn therefrom by the plaintiff. For further answer to paragarph VI, the United States denies the last sentence thereof.

4. Answering the allegations of paragraph VII, the United States denies the first sentence, and admits the second sentence thereof.

5. Answering the allegations of paragraph VIII, the United States denies all allegations therein contained to the effect that the Commission's order is invalid, void, arbitrary or capricious, or otherwise unlawful.

6. For purposes of a general answer to the complaint of plaintiff, the United States avers that the reports and orders therein assailed were made and issued within the Commission's statutory authority upon substantial evidence after full and fair hearing, and that the reports and orders are lawful and valid in all respects. Defendant, United States, denies that said reports and orders are invalid for the reasons assigned in plaintiff's complaint, or for any reason whatsoever.

Wherefore, having fully answered the complaint, the United States prays that the relief therein sought be denied and the complaint dismissed with costs to plaintiff, and that

defendant, United States, have the benefit of such other and further orders, decrees or relief as may be just and proper.

William J. Hickey, Special Assistant to the Attorney General, Department of Justice, Washington, D. C.

H. G. Morison, Assistant Attorney General; James E. Kilday, Special Assistant to the Attorney General; Edmund Port, United States Attorney, Attorneys for the United States of America, Defendant.

[fol. 36a] [File endorsement omitted.]

[fol. 37] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE AND ORDER CONSTITUTING THREE-JUDGE COURT—Filed May 6, 1952

To the Chief Judge of the United States Circuit Court of Appeals, Second Circuit:

Pursuant to Title 28, United States Code 2284, I hereby notify you that on April 11, 1952 a complaint to enjoin, set aside, annul and suspend an order of the Interstate Commerce Commission was filed in the above-entitled action, which under Title 28, United States Code, 2325, is required to be heard and determined by a District Court of three judges.

James T. Foley, Judge.

Dated: April 21, 1952, Albany, New York.

[fol. 38] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER

Pursuant to the provisions of Section 2284, Title 28, United States Code, I hereby designate the Honorable Charles E. Clark, a Circuit Judge of the Second Circuit, and the Honorable Stephen W. Brennan, a United States District Judge for the Northern District of New York, to sit with the Honorable James T. Foley, a United States District Judge for the Northern District of New York, to hear and adjudicate the above-entitled cause.

Thomas W. Swan, Chief Judge, Second Circuit.

Dated: April 30, 1952.

[fol. 38a] [File endorsement omitted.]

[fol. 39] IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE BY CORNELL STEAMBOAT COMPANY OF MOTION FOR INTERVENTION—Filed July 18, 1952

To Attorneys for Plaintiff and Defendants:

Please take notice that on the motion of Cornell Steamboat Company, and its proposed intervening answer, copies of both of which are hereto attached, and on the pleadings in this suit, the undersigned will petition this Court, at the Federal Court House in the City of Albany, State of New York, on the 25th day of July, 1952, at 11:00 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order permitting Cornell Steamboat Company, petitioner herein, to intervene as defendant in the above-entitled cause, and for such other relief as may be just.

Cornell Steamboat Company, By its Attorneys: Paul L. Clugston, 72 Wall Street, New York, N. Y.; R. Granville Curry, Frederick M. Dolan, 631 Southern Building, Washington, D. C.; Reilly & Reilly, by Desmond J. Reilly, 200 State Ct., Albany, N. Y.

Thacher, Proffitt, Prizer and Crawley, Esqs., 72 Wall Street, New York, N. Y., Of Counsel.

July 15, 1952.

[fol. 40] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION BY CORNELL STEAMBOAT COMPANY TO INTERVENE AS DEFENDANT—Filed July 18, 1952

To the Judges of the District Court of the United States for the Northern District of New York:

Cornell Steamboat Company respectfully alleges and shows as follows:

I

Petitioner, Cornell Steamboat Company (referred to herein as Cornell), is, and was at all times hereinafter mentioned, a corporation organized and existing under the laws of the State of New York with its principal office at Kingston, New York, and is and was engaged as a common carrier by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, between points within New York Harbor, N. Y., and N. J., as that harbor is defined in the order of the Interstate Commerce Commission, dated March 26, 1941, in Ex Parte 140, and Waterford, N. Y., and intermediate points on the Hudson River.

II

The Interstate Commerce Commission by a certificate and order dated February 2, 1943, has granted Cornell authority to operate in general towage and on the waters, as described in paragraph I. (250 I. C. C. 577).

[fol. 41] III

The Callanan Road Improvement Company, plaintiff in the present proceeding was authorized by the Interstate Commerce Commission in its report and order, dated August 18, 1947, to acquire the operating rights of Joseph R. Hutton to the extent that they were and are applicable on the Hudson River between Waterford, New York, and New York Harbor. Such operating rights are for transportation by self-propelled vessels or by non-self-propelled vessels with the use of separate towing vessels, and are

generally known as *freighting*, as distinguished from *towage* rights. The Commission on February 5, 1948, issued to plaintiff a certificate (Second Amended Certificate) authorizing it to conduct such freighting services.

IV

Thereafter, plaintiff published tariffs naming rates between various points on the Hudson River and New York Harbor and purporting to provide allowances from such rates to shippers in connection with barges furnished by such shippers.

V

Cornell by telegram dated May 11, 1949 and by later representations complained to the Commission that plaintiff through the allowance device set forth in its tariffs was conducting "towage" services beyond the authority in its certificate of convenience and necessity and that such unlawful practice should be terminated. The Director of the Commission's Bureau of Water Carriers & Freight Forwarders by letter, dated December 27, 1950, communicated with plaintiff directing attention to the alleged violation and calling upon it to cease and desist therefrom.

VI

Thereafter, on January 5, 1951, plaintiff filed a petition with the Commission requesting it to interpret plaintiff's "position in a formal proceeding and to find thereafter that its present tariff provisions with respect to allowances are just and reasonable and that it is, under its certificate, [fol. 42] legally authorized to publish and observe such provisions in its relations with its shippers". The Commission through an Examiner on February 23, 1951, held a hearing on the aforesaid petition by plaintiff for interpretation and on said telegraphic complaint of Cornell alleging performance of unauthorized towage by plaintiff. Cornell and certain other water carriers entered their appearances at the hearing as parties in opposition to plaintiff's petition. Cornell introduced evidence in opposition and filed briefs at every stage of the proceeding before the Commission. The Examiner filed a report finding against the con-

tentions of plaintiff and holding that the service complained of by Cornell was and is unauthorized towage. On exceptions Division 4 of the Commission by report and order, dated October 18, 1951 (Exhibit 4 to the complaint herein) upheld the Examiner and ordered the allowance provisions of the tariff in respect to such unauthorized towage to be cancelled. Plaintiff then filed a petition for reconsideration by the entire Commission but such petition was denied on March 17, 1952, and the Division's decision was thereby affirmed and sustained.

VII

The present suit by Callanan seeks to set aside the report and order of Division 4, dated October 18, 1951, as affirmed by the entire Commission on petition for reconsideration.

VIII

As hereinabove set forth, Cornell was a party to the above-mentioned proceeding before the Commission and is referred to and dealt with as such in said report of Division 4, dated October 18, 1951. Petitioner, therefore, has a statutory right to intervene in the litigation in the present proceeding, as defendant, by virtue of the provisions of United States Code, Title 28, Section 2323, reading:

> "The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party."

[fol. 43] This motion is made pursuant to such statutory authority and in accordance with the procedure provided for in Rule 24(a) of the Federal Rules of Civil Procedure (28 U.S.C.A. Rules of Civil Procedure, Rule 24).

IX

Petitioner in the above-mentioned proceeding showed that the unlawful and unauthorized practice complained of

by petitioner and considered by the Commission in the report of October 18, 1951 (Exhibit No. 4 to the complaint in the present proceeding) has resulted in loss of traffic and revenues approximating $258,000.00 for one year alone and petitioner alleges that continuation of such unlawful and unauthorized practice will cause it to suffer severe losses of traffic and revenues, if the above-mentioned order of the Commission should be enjoined and set aside, as prayed for by Callanan. Cornell's intervention in the above-entitled cause is, therefore, necessary for the protection of its interests.

Wherefore, petitioner respectfully prays that this court make an order granting it leave to intervene in the above-entitled cause, as defendant, with leave to file the attached answer therein, and for such other and further relief as to this court seems just.

Cornell Steamboat Company, By its Attorneys, Paul L. Clugston, 72 Wall Street, New York, N. Y.; R. Granville Curry, Frederick M. Dolan, 631 Southern Building, Washington, D. C. Reilly & Reilly, by Desmond J. Reilly, 200 State St., Albany, N. Y.

Thacher, Proffitt, Prizer and Crawley, Esqs., 72 Wall Street, New York, N. Y., Of Counsel.

July 15, 1952.

[fol. 44] In United States District Court.

[Title omitted]

Answer of Cornell Steamboat Company—Filed July 18, 1952

Comes now Cornell Steamboat Company, intervening defendant, and in answer to the complaint herein, respectfully represents:

I

This defendant, hereinafter referred to as Cornell, admits the allegations of fact in paragraph I of the complaint.

II.

Cornell admits the allegations of fact in paragraph II of the complaint.

III

Cornell admits the allegations of fact in paragraph III of the complaint.

IV

Cornell admits the allegations of fact in paragraph IV of the complaint but alleges that the Commission's amended certificate and order dated March 7, 1944, referred to by plaintiff herein was not to become effective until May 29, 1944, and it thus provided for ample time, namely, over two and a half months from the date thereof, for objection, if any, by plaintiff's predecessor in interest, namely, Joseph R. Hutton, for petition for reconsideration or review by the Commission of such amended order; that plaintiff's [fol. 45] predecessor in interest made no objection to and filed no petition for reconsideration or review of such amended order by the Commission and thus acquiesced and consented to the amended certificate and neither plaintiff nor its predecessor in interest can now complain that such amended certificate, upon becoming effective on May 29, 1944, resulted in any improper revocation of the original certificate issued July 17, 1942, or any part thereof. The amended certificate thus consented to, expressly certified that "public convenience and necessity require the continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between" the points referred to in the amended certificate; and thus authorized what is commonly known and recognized as "freighting" services as distinguished from, and exclusive of, "towage" services.

Cornell further alleges that when later, on August 18, 1947, Division 4 of the Commission entered the order, referred to by plaintiff, authorizing transfer to plaintiff of the amended certificate dated March 7, 1944, to the extent that said amended certificate authorizes operation on the Hudson River between Waterford, N. Y., and New York

Harbor, such transfer was of freighting rights only, namely of rights only to perform transportation by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in the transportation of commodities generally, and did not include the right to perform towage; that for the rights so transferred plaintiff paid only $2,750; and that plaintiff acquiesced in, and consented to, such amended certificate and affirmatively contended that the rights described therein, to the extent applicable on the Hudson River, were proper and valid. Plaintiff contended that such amended certificate "may not be attacked collaterally" in the proceeding before the Commission; "that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not sub- [fol. 46] ject to revocation in whole or in part" (plaintiff's Exhibit No. 3, sheet 5); and that the amended certificate must be upheld. The order dated August 18, 1947 (plaintiff's Exhibit No. 3) authorizing the transfer of rights described in the amended certificate of March 7, 1944, to the extent applicable on the Hudson River, provided that a showing should be made to the Commission of consummation of the sale of the operating rights referred to in the order of transfer, within 20 days after such consummation. Such showing was made and thereafter on February 5, 1948, the Commission issued its second amended certificate and order (a copy of which is attached hereto as Exhibit A). Such second amended certificate and order authorizes operation by plaintiff by the same terms and description of the operation as contained in the amended certificate dated March 7, 1944, to the extent applicable on the Hudson River. Neither plaintiff nor its predecessor in interest objected to the Commission's order of transfer dated August 18, 1947, or to the second amended certificate and order dated February 5, 1948. Nor did they file petitions for reconsideration, modification or review of such action by the Commission. Plaintiff thus consented to, and is bound by, the terms and provisions of the order of transfer dated August 18, 1947, and the second amended certificate and order, dated February 5, 1948, and cannot properly attack either order in this proceeding or in any proceeding.

Cornell further alleges that by the transfer of operating rights to plaintiff as authorized by the Commission's order

of August 18, 1947, and the issuance of the second amended certificate, dated February 5, 1948, plaintiff was authorized to perform only a freighting service and not a towage service; and that plaintiff in the proceeding for interpretation out of which the present suit arose admitted at the hearing on February 23, 1951, therein that the service authorized by plaintiff's certificate does not include towage.

V

Cornell admits the allegations of fact in paragraph V of the complaint except that if such allegations are intended to show or imply that the allowances to shippers published in plaintiff's tariffs are permitted or authorized by any provisions of law, Cornell denies such meaning or implica-
[fol. 47] tion and denies that any allowance may lawfully be made by plaintiff to shippers for scows or other vessels furnished by them under such tariffs. Cornell alleges that the allowance provisions of the Interstate Commerce Act (section 314, 49 U. S. C. sec. 915) are applicable only in connection with transportation services which the carrier may lawfully perform; that the transportation as to which plaintiff seeks to pay allowances is towage service outside and beyond the authority granted to it by its certificate; and that the allowances provided for in plaintiff's tariffs are therefore unauthorized and unlawful.

VI

Cornell admits the allegations of fact in paragraph VI of the complaint except that it denies that plaintiff contended before either Division 4 or the entire Commission "that the transportation practice complained of herein is intrastate commerce and beyond the jurisdiction of this Commission" and it denies that the Examiner's report or the report of Division 4 failed to contain findings, conclusions or reasons material to or necessary for consideration and determination of the issues presented.

Cornell alleges that the circumstances and conditions leading to the order complained of by plaintiff in this suit are substantially as follows:

Cornell is a corporation under the laws of the State of New York with its principal office in Kingston, N. Y., and

has been engaged in the business of towage on the Hudson River since 1837, or for a period of 115 years. The Interstate Commerce Commission by certificate and order dated February 2, 1943, certified that "public convenience and necessity require the continuance of operation by Cornell Steamboat Company as a common carrier by water by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light, in interstate or foreign commerce, between points within New York Harbor, N. Y. and N. J., as that harbor is defined in our [the Commission's] order of March 26, 1941, in Ex Parte No. 140, and Waterford, N. Y., and intermediate points on the Hudson River" and granted authority to the carrier to perform the service so described. Cornell is thus [fol. 48] limited to towage rights. Plaintiff is limited to freighting rights on the same waters.

Cornell further alleges that beginning April 17, 1949, plaintiff by its tariff I. C. C. No. 2 provided for deductions from rates to apply via tug and scow between various points shown in the tariff. Such deductions are referred to in the tariff as in each case "allowance for use of shipper's scow" if "the scow is furnished by the shipper". Free time and demurrage rules are made inapplicable when the scow is furnished by the shipper and credit is allowed in certain amounts if the carrier is not required to return the customer's scow to point of origin. The rates named were stated in the tariff not to include insurance. The net rates so published by plaintiff equaled the towage rates published by Cornell.

Cornell by telegram dated May 11, 1949, complained to the Commission that the service provided for in plaintiff's tariff I. C. C. No. 2 was in substance towage service, that the performance thereof violated plaintiff's certificate authorizing only freighting service, and that such unlawful practice should be prohibited.

Plaintiff was not able immediately, through the tariff device above described, to divert traffic from Cornell but by a supplement, namely No. 2 to its ICC tariff No. 2, effective March 26, 1950, it made sharp reductions in its published rates covering the transportation of bricks, without change as to allowance deductions, and thereby diverted a large and important part of Cornell's traffic from it, and

caused it serious injury, amounting in one year alone to over $258,000 in lost revenues.

Action by the Commission on Cornell's complaint was deferred pending action in a similar proceeding known as *Dixie Carriers, Inc., Rates and Allowances*, 278 I. C. C. 417 (decided June 13, 1950). Plaintiff informed the Commission on September 25, 1950 that it would be its purpose to conduct its operations in conformity with the determination in the *Dixie Carriers case* when the order therein became effective. The order became effective on December 26, 1950.

By letter dated December 27, 1950, the Director of the Bureau of Water Carriers and Freight Forwarders called [fol. 49] attention to the finality of the *Dixie Carriers case*, referred to further complaint by Cornell with respect to adverse effects of the allowance tariff in question, pointed out that plaintiff's service under such tariff appeared to be unauthorized towage, and called upon plaintiff to desist from such unauthorized operation.

Thereafter on January 5, 1951, plaintiff filed a petition with the Commission stating that it believed itself "entitled to the benefit of a formal proceeding" and to "be afforded an opportunity of distinguishing the holding of Division 2 in the Dixie Carriers case from the facts in its own case". The prayer of the petition was that the Commission "interpret its position in a formal proceeding and to find thereafter that its present tariff provisions with respect to allowances are just and reasonable and that it is, under its certificate, legally authorized to publish and observe such provisions in its relations with its shippers". Such petition was entitled "Petition for Interpretation and Formal Disposition of Telegraphic Complaint" and contained no reference to any claimed revocation of, or unauthorized change in, plaintiff's certificate or the certificate of its predecessor in interest. Nor was there any mention in the petition of claimed lack of authority in the Commission to frame the certificates as written.

The Commission on February 6, 1951, gave notice of a hearing on plaintiff's petition for interpretation and on the complaint of Cornell alleging performance of unauthorized

towage by plaintiff. The hearing was held on February 23, 1951.

Cornell and three other towing companies and an inland waterways association intervened in opposition to plaintiff. Cornell presented evidence in opposition.

Thereafter a brief was filed by plaintiff in support of its contentions and a reply brief was filed by Cornell. On May 28, 1951, the Examiner who heard the case rendered his proposed report and therein found and concluded that the operation by plaintiff under the tariffs in question was and is towage and, therefore, beyond the authority granted to it in its certificate of convenience and necessity.

[fol. 50] Plaintiff filed exceptions to the proposed report and Cornell replied thereto.

Division 4 thereafter issued its report and order dated October 18, 1951, set forth as Exhibit No. 4 to the complaint herein, dealt more fully with plaintiff's contentions, and sustained the Examiner's conclusions that plaintiff was and is performing unauthorized towage under its tariffs. The division found that the published charges and allowances to the extent they cover such towage service are unlawful, and ordered cancellation of such unlawful charges and allowances.

Plaintiff subsequently filed a petition for reconsideration by the entire Commission of said report and order of Division 4, and Cornell filed a reply thereto. On March 17, 1952, the Commission entered its order (set forth as Exhibit No. 4 to the complaint herein) denying the petition and thereby affirming the report and order of Division 4.

Cornell alleges that the Commission has afforded plaintiff full opportunity to be heard, has deliberately and carefully considered plaintiff's contentions, and has properly found them to be without merit. Cornell further alleges that the order of October 18, 1951, by Division 4, as affirmed by the Commission's order of March 17, 1952, was made after a full and fair hearing, is amply sustained by the evidence in the record before the Commission, is in full compliance with the statutory standards of the Interstate Commerce Act and the requirements of the Administrative Procedure Act, and is valid and lawful.

VII

Cornell denies the allegations of fact in paragraph VII of the complaint.

VIII

Cornell denies the allegations in paragraph VIII of the complaint. Further in respect to the sub-paragraphs of paragraph VIII of the complaint Cornell alleges:

[fol. 51] (1) As to sub-paragraph 1 of the complaint the Commission's order complained of by plaintiff does not in any manner change, modify or annul plaintiff's outstanding certificate authorizing it to operate but instead is a ban against abuse of the authority actually granted by such certificate, in ordering plaintiff to cease and desist from its unlawful and unauthorized towage practice through the guise of allowances under its tariffs.

(2) As to sub-paragraph 2 of the complaint, the Commission under the provisions of the Interstate Commerce Act and the National Transportation Policy is vested with the duty and responsibility to issue certificates of convenience and necessity authorizing services by common carriers by water when shown to have been performed during the critical "grandfather" period provided for in the Act or are shown to be required by public convenience and necessity. In the system of regulation thus provided for by statute the Commission has a duty of describing in such certificates the operations to be authorized by the types of equipment to be employed, in order that the competitive balance as between carriers may not be disrupted by new services without securing the appropriate authority from the Commission. Cornell, for example, is authorized to perform only towage on the Hudson River in the territory within which Callanan is authorized to perform only freighting, namely transportation by self-propelled vessels or by non-self-propelled vessels with the use of separate towing vessels. Plaintiff's certificate does not include towage, because neither under the "grandfather" provisions of the statute nor the provisions requiring a showing of public convenience and necessity has it, or its predecessor in interest, Joseph R. Hutton, shown that it had been engaged in towage services or that such services were required by public

convenience and necessity. Plaintiff's amended certificate and order, dated March 7, 1944, describing plaintiff's authorized service to be a freighting service, namely, by self-propelled vessels or by non-self-propelled vessels with the use of separate towing vessels did not include towage authority, and plaintiff and plaintiff's predecessor in interest consented to such amended certificate. Neither can now attack in this proceeding such amended certificate over eight [fol. 52] years after it became effective and after time for reconsideration thereof under the Commission's rules has expired. At the time such amended certificate was entered in 1944, the Commission by its decisions had made plain that freighting service as described in such amended certificate was and is different from, and exclusive of, towage service and that separate authority to perform the latter is necessary. Plaintiff, as hereinabove set forth, did not in the petition for interpretation, filed with the Commission on January 5, 1951, mention or refer to its present claim that the amended certificate effected a partial revocation of the pre-existing certificate. Plaintiff admitted at the hearing before the Commission that its certificate included freighting and not towing authority. Its claim as to partial revocation was made for the first time after such hearing. As hereinabove shown when transfer to plaintiff of the operating rights in such amended certificate was authorized by the Commission's order of August 18, 1947, in so far as such rights applied on the Hudson River, and when the second amended certificate, dated February 5, 1948, was issued to plaintiff, with the same description of the freighting service as contained in the amended certificate of 1944, plaintiff made no objection thereto but consented to the terms thereof.

At the same time, namely, on January 5, 1951, when plaintiff filed said petition for interpretation, it filed with the Commission (a) an application seeking authority under section 309 of the Interstate Commerce Act to perform towage on the Hudson River and requesting the issuance of a certificate of convenience and necessity specifying such service, and (b) an application seeking authority to acquire towage operating rights from another water carrier, L. B. Shaw, Inc. Both applications were heard before

an Examiner and were denied by Division 4 in docket No. W-103 (Sub. No. 1) *The Callanan Road Improvement Company Extension—Towage*, and Finance Docket No. 17202, *The Callanan Road Improvement Company Purchase, etc.*, decided May 9, 1952.

Cornell alleges that plaintiff in the present proceeding seeks to distort and expand the operating authority granted to it by the Commission to include towage services which are beyond the terms of its certificate and which in a sepa- [fol. 53] rate proceeding have been shown not to be required by public convenience and necessity because of adequate existing towage services. Plaintiff further alleges that the Commission was authorized by the Interstate Commerce Act to specify the service to be rendered by plaintiff and the type of equipment to be used by it as set forth in the certificate granted to said carrier.

(3) As to sub-paragraph 3 of the complaint, the Commission on March 7, 1944, by its amended certificate properly clarified the certificate of July 17, 1942, issued to plaintiff's predecessor in interest to conform such certificate to the service which such predecessor in interest had shown itself entitled to perform, namely, freighting by self-propelled vessels or by non-self-propelled vessels with the use of separate towing vessels and not towage. The certificate thus amended was consented to by such predecessor in interest and by plaintiff at the time transfer of operating rights under such certificate was authorized by the Commission by its order of August 18, 1947, and at the time the second amended certificate was issued to plaintiff on February 5, 1948. The Commission's action in issuing both the amended certificate and the second amended certificate was in accordance with law and pursuant to the authority properly vested in it.

(4) As to sub-paragraph 4 of the complaint an allowance could properly be made to a shipper under section 314 of the Interstate Commerce Act only in respect to a service which the carrier itself is authorized to perform. Plaintiff has no authority to perform towage and the allowances to shippers provided for in plaintiff's tariff are unauthorized and unlawful because such allowances are in respect to towage not permitted by plaintiff's certificate.

(5) As to sub-paragraph 5 of the complaint, Cornell denies that the Commission's order complained of violates section 8(b) or any other section of the Administrative Procedure Act and denies that such order is unlawful, void, arbitrary or capricious in any respect whatsoever. Cornell further denies that the Commission and the Examiner failed or refused to make required rulings or to state their reasons or basis upon each finding, conclusion, and excep-
[fol. 54] tion presented by plaintiff upon material issues. Plaintiff neither in its exceptions to said proposed report of the Examiner nor in its petition for reconsideration by the entire Commission raised any question as to compliance with, or violation of, any of the provisions of the Administrative Procedure Act, and such contentions may not now be properly made here.

Further as to sub-paragraph 5 of the complaint and the allegation by plaintiff "that the Commission is without authority in law to promulgate the order complained of herein for the reason that the transportation activity of plaintiff is in intrastate commerce and not subject to the jurisdiction of the Interstate Commerce Commission", such contention was mentioned in plaintiff's brief filed before the examiner but was not made before Division 4 or the Commission in either plaintiff's exceptions or its petition for reconsideration, and cannot now be made before this court in the absence of initial determination by the Commission.

Furthermore, Cornell alleges that the evidence before the Commission in the proceeding in which the order here complained of was made showed that some of Callanan's traffic moved between New York points and New Jersey points, and thus moved in interstate commerce. Plaintiff's certificate authorizing it to perform transportation applies only in respect to "interstate or foreign commerce". Tariffs only in respect to interstate or foreign commerce are required to be filed with the Commission. Yet plaintiff filed tariffs with the Commission, including the tariff providing for allowances condemned by Commission's order herein complained of by plaintiff. Plaintiff's filing of tariffs with the Commission, its filing of applications with the Commission for authority to acquire towage operating rights

and for authority to perform towage, and its filing of a petition for interpretation of its present certificate are a recognition by it of the Commission's jurisdiction over its operations and the interstate character thereof. The geographical boundary between the State of New Jersey and the State of New York follows the middle of the Hudson River (4 Stat. L. 708) from the 41st degree of north latitude near Yonkers, N. Y., to the main sea. Article 25 of the Inland Rules of Navigation (33 U. S. C. A. sec. 210), applies [fol. 55] to this channel, particularly in the vicinity of Yonkers, and requires vessels to "keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel." In practice, therefore, plaintiff in towing bricks under the tariff here in issue from New York points on the Hudson River north of Yonkers to points in New York Harbor must pass from New York waters to New Jersey waters and must engage in interstate commerce. Cornell, therefore, denies that plaintiff is not engaged in interstate or foreign commerce and denies that the Commission is without jurisdiction complained of by plaintiff.

Wherefore, Cornell Steamboat Company prays that the complaint in this proceeding be dismissed.

Cornell Steamboat Company, by Its Attorneys: Paul L. Clugston, 72 Wall Street, New York, N. Y.; R. Granville Curry, Frederick M. Dolan, 631 Southern Building, Washington, D. C.; Reilly & Reilly, by Desmond F. Reilly, 200 State St., Albany, N. Y.

Thacher, Proffitt, Prizer and Crawley, Esqs., 72 Wall Street, New York, N. Y., of Counsel.

July 15, 1952.

[fol. 56] EXHIBIT "A" TO ANSWER

Second Amended Certificate and Order

At a Session of the Interstate Commerce Commission, Division 4, held at its office in Washington, D. C., on the 5th day of February, A. D. 1948

No. W-103

JOSEPH R. HUTTON CONTRACT CARRIER APPLICATION

It appearing, That on March 7, 1944, the Commission, division 4, issued an amended certificate and order in the above-entitled proceeding, authorizing Joseph R. Hutton to engage in water-carrier operations as therein specified;

It further appearing, That on August 18, 1947, the division reopened the said proceeding and made and filed its report and entered its order in Finance Docket No. 15669, Joseph R. Hutton Certificate Transfer, approving transfer to The Callanan Road Improvement Company of the said amended certificate and order of March 7, 1944, to the extent that such amended certificate and order authorizes operation on the Hudson River between Waterford, N. Y., and points on New York Harbor and harbors contiguous thereto, and intermediate points;

It further appearing, That such transaction has been consummated and due notice thereof has been given; that the said amended certificate and order of March 7, 1944, should be superseded and canceled to the extent it authorizes operation as a water carrier, in interstate or foreign commerce, between points in the area defined by the order of the Commission, division 4, entered March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous Thereto,* and points along the Hudson River below its junction with the Erie Canal of the New York State Canal System, and in lieu thereof a second amended certificate should be issued to The Callanan Road Improvement Company;

And it further appearing, That transferor has no intention of continuing in service as a water carrier and has assented to cancelation of the said amended certificate of March 7, 1944, to the extent it authorizes operation, in inter-

state or foreign commerce, on the Erie and Oswego Canals of the New York State Canal System and the Niagara River:

It is hereby certified, That public convenience and necessity require operation by The Callanan Road Improvement Company as a common carrier by water, by self-propelled [fols. 57-59] vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined by the order of the Commission, division 4, entered March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous Thereto*, and points along the Hudson River below and including Waterford, N. Y.

It is ordered, That said carrier be, and it is hereby, authorized to operate as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission.

It is further ordered, That the holding of this second amended certificate by said carrier be, and it is hereby, conditioned upon the exercise of the authority specified above and upon compliance by said carrier with the requirements of the Interstate Commerce Act and the orders, rules, and regulations of the Commission thereunder.

It is further ordered, That the said amended certificate and order issued March 7, 1944, to the extent it authorizes operations as a water carrier, in interstate or foreign commerce, on the Erie and Oswego Canals of the New York State Canal System and the Niagara River, be, and it is hereby, vacated and set aside; and that the application filed in the above-entitled proceeding, to the extent it sought authority to perform service on those waterways, be, and it is hereby, dismissed.

And it is further ordered, That the said amended certificate and order issued March 7, 1944, to the extent it authorizes operation as a water carrier, in interstate or foreign commerce, between points in the area defined by the order of the Commission, division 4, entered on March 26, 1941, in Ex Parte No. 140, *Determination of the Limits of New York Harbor and Harbors Contiguous Thereto*, and points along

the Hudson River below its junction with the Erie Canal of the New York State Canal System, be, and it is hereby, superseded and canceled as of the date this second amended certificate and order takes effect; and that this second amended certificate and order shall take effect on, and be in force on and after, March 19, 1948.

By the Commission, division 4.

W. P. Bartel, Secretary. (Seal.)

[fol. 59a] [File endorsement omitted.]

[fol. 60] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER GRANTING CORNELL STEAMBOAT COMPANY PERMISSION TO INTERVENE AND FILE ANSWER—August 5, 1952

This cause coming on to be heard at this term on the motion of Cornell Steamboat Company, by its counsel, for leave to intervene in the above-entitled cause, to be made party defendant herein, and to file its answer, a copy of which is attached to the motion herein; and upon consideration of such motion, it is this 5th day of August, 1952, ordered, adjudged and decreed as follows:

Said motion by Cornell Steamboat Company for leave to intervene as party defendant and for leave to file its said answer herein be, and the same hereby is, granted.

James T. Foley, Judge of the District Court of the United States for the Northern District of New York.

[fol. 60a] [File endorsement omitted.]

[fol. 61] In United States District Court for the Northern District of New York

The Callanan Road Improvement Company, Plaintiff,

v.

United States of America and Interstate Commerce Commission, Defendants

Opinion—September 15, 1952

Before Clark, Circuit Judge; Brennan, Chief Judge, and Foley, District Judge

Action by The Callanan Road Improvement Company to enjoin and set aside an order of the Interstate Commerce Commission of October 18, 1951, 285 I.C.C. 75, affirmed on reconsideration March 17, 1952, wherein Cornell Steamboat Company was permitted to intervene as a defendant. Judgment for defendants dismissing the action on the merits.

James E. Wilson, Washington, D. C. (Thomas W. Cantwell, Albany, N. Y., on the brief), for plaintiff.

William J. Hickey, Sp. Asst. to Atty. Gen. (Newell A. Clapp, Acting Asst. Atty. Gen., James E. Kilday, Sp. Asst. to Atty. Gen., and Edmund Port, U. S. Attorney, on the brief), for the United States.

H. Neil Garson, Atty., Interstate Commerce Commission, Washington, D. C. (Edward M. Reidy, Chief Counsel, Interstate Commerce Commission, Washington, D. C., on the brief), for Interstate Commerce Commission.

R. Granville Curry, Washington, D. C. (Curry and Dolan and Frederick M. Dolan, all of Washington, D. C., Thacher, Proffitt, Prizer & Crawley and Paul L. Clugston, all of New York City, and Reilly & Reilly, and Desmond F. Reilly, all of Albany, N. Y., on the brief), for Cornell Steamboat Co.

Clark, Circuit Judge:

This is an action in usual form and course, 28 U.S.C.A. §§ 1336, 1398, 2284, 2321-2325, 49 U.S.C.A. §§ 17(9), 916(a), to set aside and enjoin the enforcement of an order of the

Interstate Commerce Commission which regulates the competition between certain common carriers by water on [fol. 62] the Hudson River in New York and New Jersey. The plaintiff, holding the Commission's certificate of public convenience and necessity for "freighting," is endeavoring to extend this to including "towing," basing its contention on several points, of which the most far-reaching is the assertion of lack of power in the Commission to limit its certificate so as to exclude towing. Several competitors intervened before the Commission, but the brunt of the opposition was borne by the initial objector to plaintiff's activities, Cornell Steamboat Company. Cornell's opposition has continued to this action wherein it has been granted intervention and has been an active defendant. The Commission's decision has been against the plaintiff. We think the Commission was right.

Consideration of the case must start with the enactment in 1940 of Part III of the Interstate Commerce Act dealing with "Water Carriers," wherein no common carrier by water is permitted to engage in transportation under the Act unless it holds a certificate of public convenience and necessity issued by the Commission, but with "grandfather" rights, to be established by and before the Commission, to those in business on January 1, 1940. § 309(a), 49 U.S.C.A. § 909(a). The Commission held Cornell's tugboats to be "water carriers" and Cornell itself a common carrier under Part III of the Act in decisions reported in 250 I.C.C. 301, 577, which were sustained on appeal to the courts. *Cornell Steamboat Co.* v. *United States*, 321 U.S. 634 affirming D.C.S.D.N.Y., 53 F. Supp. 349. The Commission did, however, grant Cornell a certificate of public convenience and necessity for towing, based on its grandfather rights, for it had been in the towage business on the Hudson River for 115 years. This certificate it still holds and on this basis it conducts its business.

The basis for plaintiff's asserted rights requires a more extensive statement. Plaintiff's predecessor in interest was one Joseph R. Hutton, who, during the crucial grandfather period prior to January 1, 1940, owned and managed one steam-power boat of about 240 horsepower, and four barges, all of which were operated as a unit. The power [fol. 63] boat was used in towing the barges and constructed

so as to carry also about 150 gross tons of freight. On occasions other barges were rented or chartered for operation in Hutton's fleet, and they transported items running all the way from wheat and wastepaper to pig and scrap iron and fertilizer from or to points in New York Harbor up the Hudson River and the State Barge Canal as far as the Niagara River. Hutton, having failed to secure complete exemption from the Commission, then sought a certificate based on grandfather rights; and this the Commission granted on July 17, 1942. *Hutton Contract Carrier Application*, 250 I.C.C. 804. In this report, Division 4 made definite findings, as just stated, of the extent of Hutton's prior operations—he had been in business for 37 years, and his ancestors had operated before him—and found that he was a common carrier, and not a contract carrier, "of commodities generally" between the points named. Its "Certificate and Order" incorporated this report as a part of itself and inter alia ordered that the applicant be "authorized to continue operations as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

Meanwhile the Commission had had occasion to state the distinction between freightage and towage. *Cornell Steamboat Co. Contract Carrier Application, supra*, 250 I.C.C. 301, 304, 305; *Eastern Transp. Co. Contract Carrier Application*, 250 I.C.C. 505, 508. This was not a new idea; it went back to well-known differences in admiralty shown by the difference in liability of a tower and of a common carrier of freight. *Stevens v. The White City*, 285 U.S. 195, 200. In these decisions in 1942, the Commission, while noting the distinction, did not require a distinct specification as to each in its certificates. That came in *Campbell Transp. Co., Common Carrier Application*, 260 I.C.C. 107, Dec. 14, 1943, wherein the Commission definitely established that "Towage is a distinct type of service or field of operation. Many carriers perform only towage, and others which were engaged in freighting by barges and towboats did not perform such towage service for shippers during the 'grandfather period.' Carriers whose certificates or permits do [fol. 64] not specifically authorize the performance of towage are without authority to engage in such service."

On March 4, 1944, the Commission of its own motion ordered the Hufton application opened for reconsideration and filed a report and amended certificate and order. *Hutton Contract Carrier Application*, 260 I.C.C. 804. Herein Divison 4 of the Commission pointed out that in its prior report it had not specified the "type of vessels" to be used by the applicant in the exercise of the authority granted, and that in the absence of any limits in the certificate, "applicant would be free to extend its operations and perform services different from those performed by him on and since the statutory date." Accordingly it modified the authority previously granted to the vessels then operated by the applicant, and again it recited the plaintiff's flotilla as above set out and made findings accordingly. And the amended certificate and order certified, "That public convenience and necessity require the continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between points in the area" substantially as defined before, and ordered that the said carrier be "authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission." The previous certificate and order was superseded and cancelled.

Hutton accepted the new certificate apparently without any question and certainly without any formal objection, either within the time permited or otherwise. He died in January, 1945, and his widow as adminstratrix sold and transferred his operating rights to the plaintiff for $2,750 by a transaction approved by the Commission's Division 4 on August 18, 1947. *Hutton Certificate Transfer* (not printed in full), 265 I.C.C. 813. Because an association of water carriers operating on the State Canal Systems protested and because plaintiff was not then operating in the [fol. 65] Canal, the certificate transfer granted plaintiff only the right of operation on the Hudson from Waterford (the point of intersection with the Canal) to New York Harbor. As the report herein below, 285 I.C.C. 75, shows,

the sale was consummated in September, 1947; and an amended certificate, limited to the Hudson, but otherwise authorizing the same operations as were permitted in the amended Hutton certificate, was issued to plaintiff on February 5, 1948. Plaintiff owns two towboats and charters others. It produces crushed stone at Kingston, N. Y., and transports it down the Hudson in its vessels for sale and delivery in the New York Harbor area. In the same tows it also operates as a carrier for hire in the movement of brick loaded on its own or chartered scows. As to these activities no question is raised; the issue arises as to its movement also of scows of the shippers, for which it makes allowance in accordance with its tariff, I.C.C. No. 2, which it initiated in 1949 and which became effective April 17, 1949. The shippers' scows have a captain on board responsible to the shipper or scow owner and paid by him. The plaintiff also returns the empty scows, where required, and does not claim the right itself to fill them or use them on return.

On May 11, 1949, Cornell complained to the Commission that this tariff embodied rates which contemplated the service of mere towage in violation of the plaintiff's certificate. On September 19, 1950, a representative of the Commission notified plaintiff that the towage operations would be unlawful, citing *Dixie Carriers, Inc., Rates and Allowances*, 278 I.C.C. 417, wherein Division 2 of the Commission had reiterated the previous rulings of the Commission that towage was not permitted unless specifically authorized in the enabling certificate. On January 2, 1951, plaintiff filed a petition with the Commission for interpretation and formal disposition of the Cornell complaint. Cornell in its reply reiterated its position, and hearings and proceedings on a proposed report and exceptions thereto finally culminated in the report and order here under attack. The report by Division 4 concluded with the view "that the petitioner has been and is performing the service of towage without appropriate authority therefor under section 309 [fol. 66] of the act, and that the rates, charges, and allowances in its tariff I.C.C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful." And its order cancelled the rates, charges, and allowances de-

scribed, and discontinued the proceeding. The report, 285 I.C.C. 75, has a complete statement of facts, to which we make reference and which we accept as our own. As a matter of fact there is substantially no conflict as to the basic facts; the issue arises as to the law applicable.

After this order plaintiff petitioned for reconsideration and Cornell replied. The petition was denied by the entire Commission on March 17, 1952, and this action followed on April 10, 1952. Plaintiff has also made other direct applications to the Commission for towage rights, all of which have been denied. These are not before us in this action.

Certain contentions, albeit vigorously urged by plaintiff, we believe can be shortly answered. Plaintiff says that it, too, is engaged in freighting, not towing, that in any event Hutton's initial certificate constituted authority to engage in the activity it now contemplates, and that the Commission lacks authority to revoke a certificate once permanently and definitively granted, cited *United States* v. *Seatrain Lines*, 329 U.S. 424. The first contention rests on concessions always made by the Commission, and stated, for example, in both the *Campbell* and *Dixie* cases, that a carrier engaged in a freighting service might employ the scows of others, including shippers, so long as it used them for its freighting purposes and did not merely transport them as service to the owners. But we agree with the Commission that the facts do not permit of such an interpretation of plaintiff's activities. The provision for return of shippers' scows light to points of origin, the inapplicability of plaintiff's ordinary rules for free time and demurrage when scows are furnished by shippers, the charge made for the return of the empty scow (or allowance in the tariff when it is not returned), the concession that plaintiff may not itself load such a scow at New York for an upstream movement in lieu of returning the vessel light to its owner [fol. 67] at origin, the control of the scows by shippers' own captains—all support the finding (and permit of no other) that shippers' scows are received by plaintiff as part of a consignment to be towed and are not used as a part of its equipment. In fact it is because of this operation and the rates and allowances it has made upon receiving shippers' scows laden with New York bound commodities that

plaintiff has been able to undercut Cornell, causing—on its initial purchase of $2,750—a loss to Cornell asserted by the latter to have reached $250,000 of revenue in a single year.

So the claimed revocation is substantially different from that in the *Seatrain* case, an outright and unconsented-to limitation of a broad certificate, which we shall discuss more at length below. Even under the principle of that case it would seem that the Commission might act in any event to correct a certificate having the obvious legal ambiguity of the first Hutton certificate which, although in form general, was nevertheless expressly based on a finding of more limited grandfather rights. But we are clear that in any event this can be done where the carrier has consented or waived objection. Here Hutton raised no question; obviously he was getting all he claimed or wanted. Later, on the transfer, plaintiff raised no objection; in fact it accepted without question a superseding certificate which cut down its rights considerably, namely, on the point of territory covered. In the very report approving the transfer, the Commission answered the there protestant's objection based upon the *Seatrain* case by referring to this consent of the applicants. Plaintiff's present attempt to expand its grant is an obvious afterthought simulated by the exigencies of its competition with Cornell. In fact its present position would seem a collateral attack upon its own certificate which was the Commission's ultimate and decisive act as to it. *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419, 448. But we prefer to place decision upon the broader ground of the Commission's power to make the classification it is now so extensively employing. To that issue we now turn.

Here the plaintiff's position is that the Commission's [fol. 68] powers are limited to the grant of the certificate of convenience and necessity and that it lacks power to specify the type of service to be rendered by a carrier after it has been certificated. Here, too, its reliance is upon *United States* v. *Seatrain Lines, supra.* In that case the Commission, having granted Seatrain a certificate for the carriage of "commodities generally" to certain ports, was held not empowered to recall it and substitute a cer-

tificate limited to carrying liquid cargoes in bulk, empty railroad cars, and property located in freight cars received from and delivered in railroad carriers, that is, the so-called "car-ferry service." But while there are some superficial resemblances, we think the differences between that case and this are substantial and decisive.

Seatrain had long been a common carrier of goods by water. It had developed a distinctive type of service for which its harbor facilities and vessels had been constructed, namely, that of ferrying freight cars in the form received from railroads. But, and this is important, it also carried commodities generally. So in 1941 it filed two applications, one for grandfather rights from New York to New Orleans, La., as it had operated since 1932 and one for new rights from New York to Texas City, Tex., on a route which it had begun to operate in 1940. In each case it described its operation as that of a "common carrier by water of commodities generally." After notice, hearing, and investigation, Division 4 of the Commission satisfied itself of Seatrain's rights thus to engage in transportation on both the routes as such a common carrier; and in 1942 a single certificate was duly issued authorizing Seatrain to carry "commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico." In 1944 the Commission, of its own motion, reopened the proceedings and against Seatrain's protect (carried eventually by direct action to the Supreme Court) cancelled the former certificate and issued the limited one noted above. The Supreme Court, affirming the decision below, *Seatrain Lines v. United States*, D. C. Del., 64 F. Supp. 156, held that this involved more than a correction and constituted a change [fol. 69] of policy and that no such power of revocation was granted the Commission. Then it went on to consider the Commission's argument that "this proceeding does not effect a partial revocation of Seatrain's certificate, but is merely an exercise of the Commission's statutory power under § 309(d) [49 U.S.C.A. § 909(d)] to fix 'terms, conditions, and limitations' for water carrier certificate holders." It said: "Whether the Commission could, under this authority, have imposed a restriction in an original

certificate as to the type of service a water carrier could utilize to serve its shippers best is by no means free from doubt." Then it pointed out certain differences between the power over water carriers of § 309(d) and the corresponding power over motor carriers of § 208, 49 U.S.C.A. § 308, which—unlike the power here—expressly authorized the Commission to "specify the service to be rendered" by those carriers. Thus it held certain of its decisions as to the regulation of motor carriers "not controlling as to the Commission's power to regulate the details of the service of water carriers" and concluded, "We can find no authority for alteration of Seatrain's certificate from the Commission's power to fix 'terms and conditions.'" *United States* v. *Seatrain Lines, supra*, 329 U. S. at pages 431, 432.

Certain differences in the legal situation and the equities are at once obvious. Here the early reopening was to clarify the grandfather rights sought and granted, and the correction was accepted. What we are dealing with is a later attempt to expand those rights beyond anything covered or contemplated by the grandfather privilege. There Seatrain fought throughout to preserve rights it had definitely exercised, some throughout the grandfather period in fact, and rights which the Commission had recognized with finality before it sought, after an interval, to take them away. In fact, Judge Biggs for the court below, D. C. Del., 64 F. Supp. 156, relied as an additional ground for reversal on the expenditures and large commitments made by Seatrain in reliance upon the original certificate, a point not reached by the Supreme Court. But we shall [fol. 70] pass all this, for we think the Commission had the power to make the classification in question distinguishing between freighting and towing service, and that this was not a regulation of "the details of service," but a "just and reasonable classification of groups of carriers included in the terms 'common carrier by water,' or 'contract carrier by water,' as the special nature of the services performed by such carriers shall require" which the Commission is expressly authorized to establish. § 304(c), 49 U.S.C.A. § 904(c).

The Commission's reasons for its classification are stated not only in its decisions we have cited above, but also in

others of long standing. Thus in *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, Division 4 limited the applicant's service to transportation by barge, that being the type it had furnished, and said: "Classification of carriers in terms of their type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights of water carriers subject to Part III of the act." And the necessity of such classification to execute the Congressional intent to preserve grandfather rights and prevent the expansion of monopoly to upset the balance existing up to 1940 is stressed in detail in cases such as *Erie & St. Lawrence Corp. Contract Carrier Application*, 260 I.C.C. 235, 238, and *Norfolk, Baltimore and Carolina Line, Inc., Ext—James R.*, 265 I.C.C. 247, 253, 254, affirmed on this point by the entire Commission, 265 I.C.C. 313. Other cases, too numerous to mention, have been cited to us where the Commission has acted either to grant both freighting and towing rights by careful and specific mention of each or by specific grant of operation in the performance of towage alone. And the Supreme Court has sustained such certificates, albeit without discussion of this specific point. See *Warner* v. *United States*, 341 U. S. 907, affirming on motion, D.C.W.D. Tenn., 97 F. Supp. 580 (re-[fol. 71] ferring to this specification on p. 582), which sustained 265 I.C.C. 543; *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U. S. 236, sustaining the certificate in 260 I.C.C. 175.

In making these classifications the Commission has relied not only on § 304(c) quoted in crucial part above, but also on § 309, dealing with the issue of certificates of public convenience and necessity. Thus subd. (c) of § 309 provides that the Commission shall issue a certificate "to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit [etc.], * * * and

that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." And subd. (d), requiring the certificate to specify routes, also provides that "there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this chapter or those established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation."

Plaintiff stresses the reliance of the Court in the *Seatrain* case on the proviso as preventing the limitation of facilities and service. But we agree with the Commission that this points up the difference between the two cases and affords a final ground of distinction between "service" [fol. 72] as there considered and defined, and scope of operations as here provided. The proviso prevents forbidding new and better equipment and facilities to carry out the operations "within the scope of such certificates"; it does not authorize an expansion of operations beyond the grandfather rights set out in subd. (a) of this section or the classification authorized by § 304 (c). We agree with the Commission that it cannot carry out the purpose and intent of Part III if such indefinite expansion as contemplated by the plaintiff is allowable against the Commission's finding of a public interest to the contrary. Specifically there will be set at naught the intent of the grandfather clause, as defined by the Court in the provisions as

to motor-carriers. *Cresent Express Lines* v. *United States*, 320 U. S. 401; *Noble* v. *United States*, 319 U. S. 88. Even though these cases may not be complete precedents for the reasons stated in the *Seatrain* case, yet they do state the use of the grandfather clause to preserve "the position which the carrier had obtained in the nation's transportation system." *Noble* v. *United States, supra*, 319 U. S. at page 92. Here Cornell and Hutton had operated without friction apparently for generations in their respective spheres on the Hudson; it would be indeed ironical if under cover of an act designed to preserve that parity, plaintiff was enabled to upset it quite completely.

We agree, therefore, with the Commission's assertion of power to make the classification in question. We should add that had we been in more doubt we should have nevertheless felt in some compunction to yield to the Commission's informed judgment and settled rulings on a matter so much within its competence. *United States* v. *Detroit & Cleveland Nav. Co., supra; Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535, 536.

Decision of this basic issue settles the case. Plaintiff attempts to rely further on the provisions of § 314, 49 U.S.C.A. § 914, authorizing a carrier to make allowances in its tariffs for services rendered by a shipper in connection with the transportation furnished, and so separately [fol. 73] supports the allowances made in its tariff for the shipper's scows. But obviously this deals with lawful transportation; it does not override earlier sections to make that lawful which is unlawful. The Commission was not overstepping its powers under this section to pass upon the reasonableness of the allowances; it never got to that question in making its decision that the enfire operation was illegal. *Emery Transp. Co.* v. *United States*, D.C.S.D. Ohio, 91 F. Supp. 644, 646, affirmed 339 U. S. 955.

Plaintiff raises two further points which seem not to have been raised, or in any event pressed, below. The first is that the Commission's statement of findings, conclusions, and ruling are somehow inadequate under the terms of § 8(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1007(b). This objection seems to border on the frivolous,

particularly as it is entirely general, without any indication how the plaintiff has been harmed or about what it is left in doubt. Whatever the reach of the A. P. Act, we think the findings entirely adequate and complete, indeed praiseworthily so. The other is the claim that the Commission lacks jurisdiction because the transportation in question was in intrastate commerce. But this claim was specifically set at rest in *Cornell Steamboat Co.* v. *United States; supra.* The New Jersey state line starts at the middle of the Hudson River from a point north of Yonkers down past New York City, and the transportation is in interstate commerce.

Accordingly the defendants must have judgment. The clerk is directed to enter judgment for the defendants, dismissing the action on the merits, immediately on the filing of this opinion.

Charles E. Clark, U. S. Circuit Judge; Stephen W. Brennan, U. S. District Judge; James T. Foley, U. S. District Judge.

Dated September 15, 1952.

[fol. 73a] [File endorsement omitted.]

[fol. 74] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed November 13, 1952

The Callanan Road Improvement Company, plaintiff in the above-entitled cause, feeling itself aggrieved by the final judgment of the United States District Court for the Northern District of New York, entered in said Court on September 15, 1952, prays an appeal from said judgment to the Supreme Court of the United States.

The particulars wherein it considers the judgment erroneous are set forth in the assignment of errors accompanying this petition, to which reference is hereby made.

Said plaintiff prays that a transcript of the record, proceedings and papers on which said judgment was made and

entered, duly authenticated, be transmitted forthwith to the Supreme Court of the United States.

Thomas W. Cantwell, 75 State Street, Albany, New York; James E. Wilson, 400 De Sales Building, Washington, D. C., Counsel for Plaintiff.

[fol. 74a] [File endorsement omitted.]

[fol. 75] In United States District Court

[Title omitted]

Notice of Appeal—Filed November 13, 1952

To United States of America and Interstate Commerce Commission, Defendants, and Cornell Steamboat Company, Intervenor:

You are hereby notified that the United States District Court for the Northern District of New York, on November 7, 1952, filed and entered an order allowing an appeal by The Callanan Road Improvement Company, plaintiff, to the Supreme Court of the United States from a judgment filed and entered on September 15, 1952, in the above-entitled cause, and that the citation signed by such court on November 7, 1952, in connection with the order allowing such appeal, is made returnable within 40 days from the date of the signing of such citation.

Attached hereto are copies of each of the following documents: the citation referred to above, the petition for and the order allowing said appeal, plaintiff's jurisdictional statement pursuant to Rule 12 of the Revised Rules of the Supreme Court of the United States, and the statement required to be served upon appellees by said Rule 12.

[fol. 76] Dated November 7, 1952.

Thomas W. Cantwell, 75 State Street, Albany, New York; James E. Wilson, 400 De Sales Building, Washington, D. C., Counsel for Plaintiff.

Service of the foregoing notice and the documents thereto and receipt of a copy thereof are hereby acknowledged and accepted this 10th day of November, 1952.

Charles H. Weston, Attorney for United States of America, Defendant. Edward M. Reidy, Attorney for Interstate Commerce Commission, Defendant. R. Granville Curry, Attorney for Cornell Steamboat Co., Intervenor.

[fol. 76a] [File endorsement omitted.]

[fol. 77] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed November 13, 1952

The Callanan Road Improvement Company, plaintiff in the above-entitled cause, in connection with its appeal, files the following assignment of errors upon which it will rely in the prosecution of its appeal to the Supreme Court of the United States from the final judgment of the District Court dated September 15, 1952. The District Court erred:

(1) In failing to hold that the order of the Interstate Commerce Commission, by Division 4, dated October 18, 1951, as affirmed by an order of the entire Commission of March 17, 1952, constitutes a revocation of plaintiff's certificate authorizing it to operate as a common carrier by water by non-self-propelled vessels with the use of separate towing vessels.

(2) In failing to hold that the order of Division 4 of the Commission of October 18, 1951, as affirmed by the order of March 17, 1952, constitutes the specification of service plaintiff may or may not render under its certificate of public convenience and necessity, which authority has not been delegated to the Commission by the Congress either expressly or impliedly.

(3) In failing to hold that the action of the Commission [fol. 78] in revoking, modifying and setting aside the certificate of plaintiff's predecessor in interest of July 17, 1942,

was and is not authorized by the Interstate Commerce Act applicable to water carriers.

(4) In failing to hold that the order of Division 4 of the Commission, dated October 18, 1951, as affirmed by the order of March 17, 1952, is unlawful, void, arbitrary and capricious as said orders violate section 8(b) of the Administrative Procedure Act.

(5) In failing to hold that the Commission's orders in question constitute a revocation of the allowance provisions of the Interstate Commerce Act.

(6) In failing to grant the prayer of plaintiff's complaint.

(7) In failing to perpetually enjoin and set aside the operation, execution, effect and enforcement of said order of October 18, 1951, as affirmed by the order of March 17, 1952.

Wherefore, the plaintiff, The Callanan Road Improvement Company, prays that said judgment of September 15, 1952, be reversed.

Thomas W. Cantwell, 75 State Street, Albany, New York; James E. Wilson, 400 De Sales Building, Washington, D. C., Counsel for Plaintiff.

[fol. 78a] [File endorsement omitted]

[fol. 79] In United States District Court

[Title omitted]

Order Allowing Appeal—Filed November 13, 1952

The Callanan Road Improvement Company, plaintiff in the above-entitled cause, having made and filed a petition praying an appeal to the Supreme Court of the United States from the final judgment of this Court in said cause entered on September 15, 1952, and having also made and filed an assignment of errors, and a statement of jurisdiction, and having in all respects conformed to the statutes and rules of court in such cases made and provided:

It is ordered and decreed, that said appeal be, and the same is hereby, allowed as prayed for.

Dated November 7, 1952.

James T. Foley, United States District Judge.

[fol. 79a] [File endorsement omitted]

[fols. 80-81] Citation in usual form showing service on Charles H. Weston et al. omitted in printing.

[fols. 82-83] STATEMENT BY PLAINTIFF DIRECTING ATTENTION TO PARAGRAPH 3 OF RULE 12 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES—(Omitted in printing)

[fol. 84] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S (APPELLANT'S) PRAECIPE FOR TRANSCRIPT OF RECORD—Filed November 13, 1952

To the Clerk of the above-named Court:

You are hereby requested to prepare a transcript of the record in the above-entitled cause to be filed in the Supreme Court of the United States, pursuant to an appeal allowed therein, and to include in such transcript of record the following, to wit:

(1) Complaint of The Callanan Road Improvement Company, dated April 10, 1952, together with exhibits 1-4, inclusive.

(2) Answer of the Interstate Commerce Commission.

(3) Answer of the United States.

(4) Order constituting three-judge court.

(5) Motion of Cornell Steamboat Company for leave to intervene as a defendant.

(6) Order of Court allowing intervention of Cornell Steamboat Company, as a defendant.

(7) Answer of Cornell Steamboat Company.

(8) Record of the Interstate Commerce Commission in Docket No. W-103 entitled *Joseph R. Hutton Contract Car-*
[fols. 85-86] *rier Application*, as offered in evidence herein by plaintiff.

(9) All other records of proceedings as offered in evi-

dence herein by plaintiff, intervenor, or other parties, and in the event no such records were offered as evidence, statement of the Clerk to the effect that records transmitted under (8) above constitute all records of the Interstate Commerce Commission offered in evidence herein.

(10) Findings of fact and conclusions of law entered by the Court on September 15, 1952.

(11) Final judgment of the Court entered September 15, 1952.

(12) Plaintiffs petition for appeal.

(13) Notice of appeal and acknowledgment of service.

(14) Assignment of errors.

(15) Order allowing appeal.

(16) Citation on appeal.

(17) Statement of jurisdiction of the Supreme Court of the United States.

(18) Statement of plaintiff directing attention to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States.

(19) Praecipe for transcript of record and acknowledgment thereof, and

(20) All docket entries in their appropriate order.

Thomas W. Cantwell, 75 State Street, Albany, New York; James E. Wilson, 400 De Sales Building, Washington, D. C., Counsel for Plaintiff.

[fol. 86a] [File endorsement omitted.]

[fol. 87] IN UNITED STATES DISTRICT COURT.

Civil 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY, a Corporation, South Bethlehem, New York, Plaintiff,

vs.

THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants

CORNELL STEAMBOAT COMPANY, Party Defendant

DOCKET ENTRIES

1952

Apr. 11. Filed Complaint and issued Summons, 1 Orig. and 4 copies, $15.00.

Apr. 16. Filed Summons served Apr. 14, 1952 on Edmund Port, U. S. Attorney; Apr. 11, 1952 on Secretary, Interstate Commerce Commission, by registered mail for Interstate Commerce Commission; Apr. 11, 1952 on The Attorney General for the United States of America, by registered mail.

May 6. Filed Notice and Order & entered Order constituting District Court of Three Judges.

June 7. Filed Answer of the Interstate Commerce Commission.

June 14. Filed Answer of United States of America.

July 18. Filed Motion and Notice of Motion for Intervention and an Original Answer of Cornell Steamboat Company, returnable Albany, July 25, at 11 A. M.

Aug. 5. Filed and entered Order granting Cornell Steamboat Company, permission to intervene and file Answer.

Aug. 5. Filed and entered Order fixing time for hearing —Aug. 12, 1952—Albany, N. Y.

Aug. 5. Filed Notice pursuant to Sec. 2284, Title 28, U. S. C. A. with certificate of service (Mailed copy of Notice to Hon. James P. McGranery, Atty. Genl. of U. S. Dept. of Justice, Washington, D. C.; Hon. Edmund Port, U. S. Atty., Syracuse, N. Y., Thacher, Proffitt, Prizer & Crawley, Esqs. (Desmond F. Reilly, Esq. of Counsel, 72 Wall St., New York 5, N. Y.)

Aug. 12. Filed 3 packages certified record of Interstate Commerce Commission.

Sept. 15. Filed Opinion of Statutory Court dismissing Complaint.

Sept. 15. Entered Judgment dismissing Complaint.

Sept. 15. Notified all attorneys of record, of entry of judgment.

Aug. 12. Hearing on an order revocating order of Interstate Commerce Commission and for Injunction (Hon. Chas. E. Clark, Circuit Judge; Hon. Stephen W. Brennan, U. S. D. Judge and Hon. James T. Foley, U. S. D. J.)

Decision reserved.

Nov. 13. Filed Petition for Appeal.

Nov. 13. Filed and entered Order allowing Appeal to Supreme Court of United States from final judgment of U. S. District Court, entered Sept. 15, 1952.

Nov. 13. Filed Notice of Appeal, $5.00.

Nov. 13. Filed Plaintiff's (Appellant's) Praecipe for Transcript of Record.

Nov. 13. Filed Statement by Plaintiff directing attention to Par. 3 of Rule 12 of the Revised Rules of the Supreme Court of U. S.

Nov. 13. Filed Citation on Appeal.

Nov. 13. Filed Assignment of Errors.

Nov. 13. Filed Statement as to Jurisdiction.

Nov. 22. Filed Motion by Cornell Steamboat Company, intervening defendant, to affirm.

Nov. 26. Filed Motion to affirm judgment of the District Court; by Interstate Commerce Commission.

[fol. 88] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 89] [File endorsement omitted]

IN THE SUPREME COURT OF THE UNITED STATES

[Title omitted]

STATEMENT OF POINTS AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed December 23, 1952

In its brief and oral argument before this Court on its appeal in the above-entitled case, appellant will rely upon the points made in its assignment of errors.

Appellant further states that the record in this cause as filed in this Court pursuant to the praecipe for transcript of record is designated for printing except the certified record of the Interstate Commerce Commission in Docket No. W-103 entitled *Joseph R. Hutton Contract Carrier* designated as item 8 in appellant's praecipe for transcript of record and all other records as offered in evidence before the United States District Court for the Northern District of New York and designated as item 9 in appellant's praecipe for transcript of record. As to items 8 and 9 omitted as parts of the record to be printed it is believed that said items, consisting of certified copies of the testimony and exhibits before the Interstate Commerce Commission, and other related items are not necessary for extensive reference. Appellant desires, however, that said items 8 and 9 referred to above shall stand as a part of the record on appeal as original exhibits and shall not be printed, but [fol. 90] that any party and the Court may refer to such documents with the same force and effect as if they had been printed in full in the transcript of record.

James E. Wilson, De Sales Building, Washington, D. C., Thomas W. Cantwell, 75 State Street, Albany, New York, Counsel for Appellant.

[fol. 91] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

[Title omitted]

No. 488

ORDER NOTING PROBABLE JURISDICTION—February 2, 1953

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary docket.

February 2, 1953.

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HAROLD B. WILLEY, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK,

Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND CORNELL STEAMBOAT COMPANY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

STATEMENT AS TO JURISDICTION

THOMAS W. CANTWELL,
JAMES E. WILSON,
Counsel for Appellant.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

Defendants.

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, the Callanan Road Improvement Company submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the District Court entered in this cause on September 15, 1952. A petition for appeal is presented to the District Court herewith on November 7, 1952.

Opinion Below

The opinion of the United States District Court is not yet reported. A copy is attached hereto as Appendix A.

Jurisdiction

The jurisdiction of the Supreme Court to review by direct appeal the decision in this cause is conferred by 28 U. S. C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this cause: *United States* v. *Capital Transit Company*, 338 U. S. 286; *United States* v. *Pacific Coast Wholesalers' Association*, 338 U. S. 689; *Alabama Great Southern Railroad Co.* v. *United States*, 340 U. S. 316.

Questions Presented

The following questions are presented:

(1) Whether the Interstate Commerce Commission may incorporate by reference an order or decision in a certificate issued to a water carrier under Part III of the Interstate Commerce Act which has the effect of a partial modification or revocation of said certificate;

(2) Whether the Interstate Commerce Commission may specify service to be rendered by a water carrier even though the Interstate Commerce Act does not specifically authorize the delegation of such authority to the Interstate Commerce Commission;

(3) Whether the Interstate Commerce Commission may revoke a certificate issued to a water carrier even in the absence of objections by the holders thereof;

(4) Whether the Commission's order or report complained of herein is contrary to the provisions of Section 8(b) of the Administrative Procedure Act, and

(5) Whether the Interstate Commerce Commission may modify or revoke a separate provision of the Interstate Commerce Act.

Statutes Involved

The pertinent provisions under Part III of the Interstate Commerce Act, 24 Stat. 379, as amended, 49 U. S. C. 901 et seq., and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 et seq., are as follows:

Interstate Commerce Act

Section. 309. (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: Provided, however, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect.

(d) Such certificate shall specify the route or routes over which, or the parts to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, condi-

tions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

Sec. 304. (c) The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms "common carrier by water", or "contract carrier by water", as the special nature of the services performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements consistent with the provisions of this part to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest.

Sec. 314. If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instru-

mentality so furnished, and fix the same by appropriate order.

Administrative Procedure Act

Sec. 8. (b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decision (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement or (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

Statement

Plaintiff is the successor in interest to Joseph R. Hutton, formerly of Kingston, N. Y. Pursuant to the provisions of 49 U. S. C. 909(a), the Interstate Commerce Commission on July 17, 1942 issued a certificate to plaintiff's predecessor authorizing operations as a common carrier by water in interstate or foreign commerce on the Hudson River in the transportation of commodities generally. This certificate did not specify the type of equipment plaintiff's predecessor was authorized to use nor did it define or describe the nature, type, or scope of service plaintiff's predecessor was authorized to render other than as a common carrier in the transportation of commodities generally.

On March 7, 1944, the Commission, without notice to plaintiff's predecessor in interest, revoked and cancelled the certificate dated July 17, 1942, and substituted in lieu thereof a certificate dated the same date which limited the authority granted in the earlier certificate to the use of self-propelled vessels and non-self-propelled vessels with the use of separate towing vessels. Plaintiff thereafter was authorized by the Commission to acquire the certificate of Joseph R. Hutton and in due course it filed a tariff with the Interstate Commerce Commission containing certain allowance provisions as are contemplated and authorized in section 314 of the Interstate Commerce Act. This tariff stated the amount to be allowed shippers when scow equipment was furnished to plaintiff for the transportation of brick on the Hudson River. Upon complaint of a competitor, intervenor herein, the Commission ultimately held that plaintiff could not maintain these allowances because its certificate did not authorize it to engage in towage, a classification of water carrier service which is not defined or incorporated in plaintiff's certificate. The District Court dismissed the complaint of plaintiff which sought to enjoin and set aside the Commission's order complained of herein.

The Questions Presented by This Appeal Are Substantial

This appeal presents several very substantial questions which plaintiff believes have been decided by the District Court contrary to and inconsistent with the provisions of the Interstate Commerce Act, the Administrative Procedure Act, and the decisions of this Court.

The first of the questions of law is whether or not the Interstate Commerce Commission may incorporate by reference an order or decision in a certificate issued and outstanding to a water carrier under Part III of the Interstate Commerce Act which has the effect of partial modifica-

tion or revocation of the certificate. The Interstate Commerce Commission held that plaintiff's certificate did not permit it to engage in an operation which had been classified as towage. The Commission was of the opinion that the use by plaintiff of shippers scows pursuant to the allowance provisions of its tariff constituted a towage service. Since this type of service was not specifically authorized in plaintiff's certificate, cancellation of the allowance provisions of plaintiff's tariff was required. As a matter of law the Commission's order is invalid as it results in a partial revocation or modification of plaintiff's certificate. The power to modify, revoke, cancel, or amend certificates issued by the Interstate Commerce Commission to water carriers under Part III of the Interstate Commerce Act has not been granted in that act. Accordingly, any effort on the part of the Commission to accomplish these results is invalid and unlawful. This Court held in *United States* v. *Seatrain Lines*, 329 U. S. 423, that the Interstate Commerce Act does not authorize the Commission to cancel or revoke a certificate issued to a water carrier. The Commission's decision which requires plaintiff to cease an operation involving the use of shippers scows accomplishes indirectly the same results that the commission has denied by direct methods, i.e., modification or revocation of an outstanding certificate. Plaintiff submits that this point is critically important to all water carriers. Under this decision the Commission could at will create classes or types of service in the water carrier trade and thereafter prohibit a water carrier in engaging in that type of service unless there was a specific affirmative provision authorizing such service. The Commission has refused to incorporate classifications in outstanding certificates on the ground that this procedure would result in partial revocation of certificates. The Commission however, failed to follow its own prior decisions in this case.

The second question presented by this appeal is whether the Interstate Commerce Commission may specify the service to be rendered by a water carrier. This Court held in the *Seatrain* case that the Commission is not authorized under section 309 to specify the service to be rendered by a water carrier. Since this authority is not vested in the Commission it necessarily follows that the Commission may not specify the type of vessels or equipment to be used by water carriers. *Crescent Express Lines* v. *United States*, 320 U. S. 401.

The order complained of herein constitutes a direct effort on the part of the Commission to specify the type of service plaintiff may or may not engage in as a water carrier operating in interstate commerce. The Commission's order is contrary to the provisions of section 309 of the Interstate Commerce Act and to this Court's decision in the *Seatrain* case. Again, as under the preceding point, the Commission would be at liberty in the future to specify other types of services which a water carrier may or may not provide unless its authority in that regard is clarified and determined.

The third point presented by this appeal also involves the authority of the Interstate Commerce Commission to take action which is not directly and specifically authorized by the Interstate Commerce Act. The certificate of plaintiff's predecessor in interest was revoked or cancelled by the Commission without the prior knowledge or consent of the holder. Plaintiff has complained to the Commission that this action was not authorized or permitted by the Interstate Commerce Act. Nevertheless, the Commission has not seen fit to recognize the plaintiff's complaint in that regard.

In the decision of this Court in the *Seatrain* case it was specifically held that the Commission is without authority to revoke a certificate issued to a water carrier under Part

III of the Interstate Commerce Act. This Court observed in that case that there were no revocation provisions of a certificate under Part III of the Interstate Commerce Act as there are under Part II of the same act relating to motor carriers. Plaintiff contends that silence or lack of protest on the part of its predecessor in interest could not confer jurisdiction on the Commission to take action when jurisdiction was not authorized by the Interstate Commerce Act. Otherwise stated, if the Commission lacked authority in the first instance, jurisdiction could not be conferred by the action of non-action of plaintiff or its predecessor. Plaintiff respectfully submits that the Commission's action is directly opposed to the doctrine of the *Seatrain* case.

The fourth question raised by this appeal is whether the Commission has failed to comply with the provisions of section 8(b) of the Administrative Procedure Act. The provisions of that section are set forth herein. In the various steps before the Commission the plaintiff presented exceptions and supporting reasons to justify its position. For the most part these positions have been ignored by the Commission. Specifically, plaintiff challenged the right of the Commission to (a) specify the service to be rendered by a water carrier in the type of vessels to be used. (b) the right of the Commission to revoke a certificate issued to a water carrier, (c) the right of the Commission to accomplish by interpretation a modification or revocation of a certificate issued to a water carrier, and whether or not the Commission could modify section 314 of the act by giving preference to one of its earlier orders. These questions and exceptions although submitted to the Commission for decision were ignored and left unanswered and instead the Commission chose to dispose of the case on another ground, i.e., whether or not plaintiff was in fact engaged in a towage service. Plaintiff respectfully submits that the Commission

has ignored the provisions of section 8(b) of the Administrative Procedure Act in that it did not rule upon each of the findings, conclusions, or exceptions presented by the plaintiff.

The last point presented by this appeal is whether the Commission's action has the effect of modifying or revoking the provisions of section 314 of the act insofar as water carriers are concerned. The requirements imposed by the Commission in this case are impossible of compliance if a water carrier is to publish allowance provisions in a tariff. The Commission's requirement would eliminate entirely any necessity of allowance provisions when equipment of a shipper was furnished. The only way a water carrier could comply with the Commission's requirements is by lease or charter of equipment and under those circumstances there would be no need or occasion for a carrier to publish allowance provisions under section 314. In this way the Commission would have effectively abolished the provisions of section 314 in favor of one of its orders.

Plaintiff is of the firm belief that these questions as outlined above are substantial and of real interest to the water carrier transportation industry. The Commission has exceeded its jurisdiction in the regulation of water carriers and may well do so again unless these questions are finally decided by this Court.

Respectfully submitted,

THOMAS W. CANTWELL,
75 State Street,
Albany, New York.
JAMES E. WILSON,
400 De Sales Building,
Washington, D. C.
Counsel for Plaintiff.

APPENDIX "A"

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

Civil No. 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY,
Plaintiff,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,
Defendants.

Before Clark, Circuit Judge, Brennan, Chief Judge, and Foley, District Judge.

Action by The Callanan Road Improvement Company to enjoin and set aside an order of the Interstate Commerce Commission of October 18, 1951, 285 I. C. C. 75, affirmed on reconsideration March 17, 1952, wherein Cornell Steamboat Company was permitted to intervene as a defendant. Judgment for defendants dismissing the action on the merits.

James E. Wilson, Washington, D. C. (Thomas W. Cantwell, Albany, N. Y., on the brief), for plaintiff.

William J. Hickey, Sp. Asst. to Atty. Gen. (Newell A. Clapp, Acting Asst. Atty. Gen., James E. Kilday, Sp. Asst. to Atty. Gen., and Edmund Port, U. S. Atty., on the brief), for the United States.

H. Neil Garson, Atty., Interstate Commerce Commission, Washington, D. C. (Edward M. Reidy, Chief Counsel, Interstate Commerce Commission, Washington, D. C., on the brief), for Interstate Commerce Commission.

R. Granville Curry, Washington, D. C. (Curry and Dolan and Frederick M. Dolan, all of Washington, D. C., Thacher, Proffitt, Prizer & Crawley and Paul L. Clugston, all of New York City, and Reilly & Reilly and Desmond F. Reilly, all of Albany, N. Y., on the brief), for Cornell Steamboat Co.

CLARK, Circuit Judge.

This is an action in usual form and course, 28 U. S. C. A. §§1336, 1398, 2284, 2321-2325, 49 U. S. C. A. §§17 (9), 916a), to set aside and enjoin the enforcement of an order of the Interstate Commerce Commission which regulates the competition between certain common carriers by water on the Hudson River in New York and New Jersey. The plaintiff, holding the Commission's certificate of public convenience and necessity for "freighting," is endeavoring to extend this to include "towing," basing its contention on several points, of which the most far-reaching is the assertion of lack of power in the Commission to limit its certificate so as to exclude towing. Several competitors intervened before the Commission, but the brunt of the opposition was borne by the initial objector to plaintiff's activities, Cornell Steamboat Company. Cornell's opposition has continued to this action wherein it has been granted intervention and has been an active defendant. The Commission's decision has been against the plaintiff. We think the Commission was right.

Consideration of the case must start with the enactment in 1940 of Part III of the Interstate Commerce Act dealing with "Water Carriers," wherein no common carrier by water is permitted to engage in transportation under the Act unless it holds a certificate of public convenience and necessity issued by the Commission, but with "grandfather" rights, to be established by and before the Commission, to those in business on January 1, 1940. §309(a), 49 U. S. C. A. §909(a). The Commission held Cornell's tugboats to be "water carriers" and Cornell itself a common carrier under Part III of the Act in decisions reported in 250 I. C. C. 301, 577, which were sustained on appeal to the courts. *Cornell Steamboat Co.* v. *United States*, 321 U. S. 634, affirming D. C. S. D. N. Y., 53 F. Supp. 349. The Commission did, however, grant Cornell a certificate of public convenience and necessity for towing, based on its grandfather rights, for it had been in the towage busines on the Hudson River for 115 years. This certificate it still holds and on this basis it conducts its business.

The basis for plaintiff's asserted rights requires a more extensive statement. Plaintiff's predecessor in interest was one Joseph R. Hutton, who, during the crucial grandfather period prior to January 1, 1940, owned and managed one steam-power boat of about 240 horsepower, and four barges, all of which were operated as a unit. The power boat was used in towing the barges and constructed so as to carry also about 150 gross tons of freight. On occasions other barges were rented or chartered for operation in Hutton's fleet, and they transported items running all the way from wheat and wastepaper to pig and scrap iron and fertilizer from or to points in New York Harbor up the Hudson River and the State Barge Canal as far as the Niagara River. Hutton, having failed to secure complete exemption from the Commission, then sought a certificate based on grandfather rights; and this the Commission granted on July 17, 1942. *Hutton Contract Carrier Application*, 250 I. C. C. 804. In this report, Division 4 made definite findings, as just stated, of the extent of Hutton's prior operations—he had been in business for 37 years, and has ancestors had operated before him—and found that he was a common carrier, and not a contract carrier, "of commodities generally" between the points named. Its "Certificate and Order" incorporated this report as a part of itself and inter alia ordered that the applicant be "authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission."

Meanwhile the Commission had had occasion to state the distinction between freightage and towage. *Cornell Steamboat Co. Contract Carrier Application, supra*, 250 I. C. C. 301, 304, 305; *Eastern Transp. Co. Contract Carrier Application*, 250 I. C. C. 505, 508. This was not a new idea; it went back to well-known differences in admiralty shown by the difference in liability of a tower and of a common carrier of freight. *Stevens* v. *The White City*, 285 U. S. 195, 200. In these decisions in 1942 the Commission, while noting the distinction, did not require a distinct specification as to each in its certificates. That came in *Cambell*

Transp. Co., Common Carrier Application, 260 I. C. C. 107, Dec. 14, 1943, wherein the Commission definitely established that "Towage is a distinct type of service or field of operation. Many carriers perform only towage, and others which were engaged in freighting by barges and towboats did not perform such towage service for shippers during the 'grandfather period.' Carriers whose certificates or permits do not specifically authorize the performance of towage are without authority to engage in such service."

On March 4, 1944, the Commission of its own motion ordered the Hutton application opened for reconsideration and filed a report and amended certificate and order. *Hutton Contract Carrier Application*, 260 I. C. C. 804. Herein Division 4 of the Commission pointed out that in its prior report it had not specified the "type of vessels" to be used by the applicant in the exercise of the authority granted, and that in the absence of any limits in the certificate, "applicant would be free to extend its operations and perform services different from those performed by him on and since the statutory date." Accordingly it modified the authority previously granted to the vessels then operated by the applicant, and again it recited the plaintiff's flotilla as above set out and made findings accordingly. And the amended certificate and order certified, "That public convenience and necessity require the continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between points in the 'area" substantially as defined before, and ordered that the said carrier be "authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission." The previous certificate and order was superseded and cancelled.

Hutton accepted the new certificate apparently without any question and certainly without any formal objection, either within the time permitted or otherwise. He died in January, 1945, and his widow as administratrix sold and

transferred his operating rights to the plaintiff for $2,750 by a transaction approved by the Commission's Division 4 on August 18, 1947. *Hutton Certificate, Transfer* (not printed in full), 265 I. C. C. 813. Because an association of water carriers operating on the State Canal Systems protested and because plaintiff was not then operating in the Canal, the certificate transfer granted plaintiff only the right of operation on the Hudson from Waterford (the point of intersection with the Canal) to New York Harbor. As the report herein below, 285 I. C. C. 75, shows, the sale was consummated in September, 1947; and an amended certificate, limited to the Hudson, but otherwise authorizing the same operations as were permitted in the amended Hutton certificate, was issued to plaintiff on February 5, 1948. Plaintiff owns two towboats and charters others. It produces crushed stone at Kingston, N. Y., and transports it down the Hudson in its vessels for sale and delivery in the New York Harbor area. In the same tows it also operates as a carrier for hire in the movement of brick loaded on its own or chartered scows. As to these activities no question is raised; the issue arises as to its movement also of scows of the shippers, for which it makes allowance in accordance with its tariff, I. C. C. No. 2, which it initiated in 1949 and which became effective April 17, 1949. The shippers' scows have a captain on board responsible to the shipper or scow owner and paid by him. The plaintiff also returns the empty scows, where required, and does not claim the right itself to fill them or use them on return.

On May 11, 1949, Cornell complained to the Commission that this tariff embodied rates which contemplated the service of mere towage in violation of the plaintiff's certificate. On September 19, 1950, a representative of the Commission notified plaintiff that the towage operations would be unlawful, citing *Dixie Carriers, Inc., Rates and Allowances*, 278 I. C. C. 417, wherein Division 2 of the Commission had reiterated the previous rulings of the Commission that towage was not permitted unless specifically authorized in the enabling certificate. On January 2, 1951, plaintiff filed a petition with the Commission for interpretation and formal disposition of the Cornell complaint.

Cornell in its reply reiterated its position, and hearings and proceedings on a proposed report and exceptions thereto finally culminated in the report and order here under attack. The report by Division 4 concluded with the view "that the petitioner has been and is performing the service of towage without appropriate authority therefor under section 309 of the act, and that the rates, charges, and allowances in its tariff I. C. C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful." And its order cancelled the rates, charges, and allowances described, and discontinued the proceeding. The report, 285 I. C. C. 75, has a complete statement of facts, to which we make reference and which we accept as our own. As a matter of fact there is substantially no conflict as to the basic facts; the issue arises as to the law applicable.

After this order plaintiff petitioned for reconsideration and Cornell replied. The petition was denied by the entire Commission on March 17, 1952, and this action followed on April 10, 1952. Plaintiff has also made other direct applications to the Commission for towage rights, all of which have been denied. These are not before us in this action. Certain contentions, albeit vigorously urged by plaintiff, we believe can be shortly answered. Plaintiff says that it, too, is engaged in freighting, not towing, that in any event Hutton's initial certificate constituted authority to engage in the activity it now contemplates, and that the Commission lacks authority to revoke a certificate once permanently and definitively granted, citing *United States* v. *Seatrain Lines*, 329 U. S. 424. The first contention rests on concessions always made by the Commission and stated, for example, in both the *Campbell* and *Dixie* cases, that a carrier engaged in a freighting service might employ the scows of others, including shippers, so long as it used them for its freighting purposes and did not merely transport them as service to the owners. But we agree with the Commission that the facts do not permit of such an interpretation of plaintiff's activities. The provision for return of shippers' scows light to points of origin, the inapplicability of plaintiff's ordinary rules for free time and demurrage when scows are furnished by shippers, the charge made for the

return of the empty scow (or allowance in the tariff when it is not returned), the concession that plaintiff may not itself load such a scow at New York for an upstream movement in lieu of returning the vessel light to its owner at origin, the control of the scows by the shippers' own captains—all support the finding (and permit of no other) that shippers' scows are received by plaintiff as part of a consignment to be towed and are not used as a part of its equipment. In fact it is because of this operation and the rates and allowances it has made upon receiving shippers' scows laden with New York bound commodities that plaintiff has been able to undercut Cornell, causing—on its initial purchase of $2,750—a loss to Cornell asserted by the latter to have reached $250,000 of revenue in a single year.

So the claimed revocation is substantially different from that in the *Seatrain* case, an outright and unconsented-to limitation of a broad certificate, which we shall discuss more at length below. Even under the principle of that case it would seem that the Commission might act in any event to correct a certificate having the obvious legal ambiguity of the first Hutton certificate which, although in form general, was nevertheless expressly based on a finding of more limited grandfather rights. But we are clear that in any event this can be done where the carrier has consented or waived objection. Here Hutton raised no question; obviously he was getting all he claimed or wanted. Later, on the transfer, plaintiff raised no objection; in fact it accepted without question a superseding certificate which cut down its rights considerably, namely, on the point of territory covered. In the very report approving the transfer, the Commission answered the there protestant's objection based upon the *Seatrain* cases by referring to this consent of the applicants. Plaintiff's present attempt to expand its grant is an obvious afterthought stimulated by the exigencies of its competition with Cornell. In fact its present position would seem a collateral attack upon its own certificate which was the Commission's ultimate and decisive act as to it. *United States v. Rock Island Motor Transit Co.*, 340 U. S. 419, 448. But we prefer to place decision upon the broader ground of the Commission's

power to make the classification it is now so extensively employing. To that issue we now turn.

Here the plaintiff's position is that the Commission's powers are limited to the grant of the certificate of convenience and necessity and that it lacks power to specify the type of service to be rendered by a carrier after it has been certificated. Here, too, its reliance is upon *United States* v. *Seatrain Lines, supra.* In that case the Commission, having granted Seatrain a certificate for the carriage of "commodities generally" to certain ports, was held not empowered to recall it and substitute a certificate limited to carrying liquid cargoes in bulk, empty railroad cars, and property located in freight cars received from and delivered to railroad carriers, that is, the so-called "car-ferry service." But while there are some superficial resemblances, we think the differences between that case and this are substantial and decisive.

Seatrain had long been a common carrier of goods by water. It had developed a distinctive type of service for which its harbor facilities and vessels had been constructed, namely, that of ferrying freight cars in the form received from railroads. But, and this is important, it also carried commodities generally. So in 1941 it filed two applications, one for grandfather rights from New York to New Orleans, La., as it had operated since 1932 and one for new rights from New York to Texas City, Tex., on a route which it had begun to operate in 1940. In each case it described its operation as that of a "common carrier by water of commodities generally." After notice, hearing and investigation, Division 4 of the Commission satisfied itself of Seatrain's rights thus to engage in transportation on both the routes as such a common carrier; and in 1942 a single certificate was duly issued authorizing Seatrain to carry "commodities generally between the ports of New York, N. Y., New Orleans, La., and Texas City, Tex., by way of the Atlantic Ocean and the Gulf of Mexico." In 1944 the Commission, of its own motion, reopened the proceedings and against Seatrain's protest (carried eventually by direct action to the Supreme Court) cancelled the former certificate and issued the limited one noted above. The Supreme

Court, affirming the decision below, *Seatrain Lines* v. *United States*, D. C. Del., 64 F. Supp. 156, held that this involved more than a correction and constituted a change of policy and that no such power of revocation was granted the Commission. Then it went on to consider the Commission's argument that "this proceeding does not effect a partial revocation of Seatrain's certificate, but is merely an exercise of the Commission's statutory power under §309(d) [49 U. S. C. A. §909(d)] to fix 'terms, conditions, and limitations' for water carrier certificate holders." It said: "Whether the Commission could, under this authority, have imposed a restriction in an original certificate as to the type of service a water carrier could utilize to serve its shippers best is by no means free from doubt." Then it pointed out certain differences between the power over water carriers of §309(d) and the corresponding power over motor carriers of §208, 49 U. S. C. A. §308, which—unlike the power here—expressly authorized the Commission to "specify the service to be rendered" by those carriers. Thus it held certain of its decisions as to the regulation of motor carriers "not controlling as to the Commission's power to regulate the details of the service of water carriers" and concluded, "We can find no authority for alteration of Seatrain's certificate from the Commission's power to fix 'terms and conditions.'" *United States* v. *Seatrain Lines*, *supra*, 329 U. S. at pages 431, 432.

Certain differences in the legal situation and the equities are at once obvious. Here the early reopening was to clarify the grandfather rights sought and granted, and the correction was accepted. What we are dealing with is a later attempt to expand those rights beyond anything covered or contemplated by the grandfather privilege. There Seatrain fought throughout to preserve rights it had definitely exercised, some throughout the grandfather period in fact, and rights which the Commission had recognized with finality before it sought, after an interval, to take them away. In fact, Judge Biggs for the court below, D. C. Del., 64 F. Supp. 156, relied as an additional ground for reversal on the expenditures and large commitments made by Seatrain in reliance upon the original certificate, a point not

reached by the Supreme Court. But we shall pass all this, for we think the Commission had the power to make the classification in question distinguishing between freighting and towing service, and that this was not a regulation of "the details of service," but a "just and reasonable classification of groups of carriers included in the terms 'common carrier by water,' or 'contract carrier by water,' as the special nature of the services performed by such carriers shall require" which the Commission is expressly authorized to establish. § 304(c), 49 U.S.C.A. § 904(c).

The Commission's reasons for its classification are stated not only in its decisions we have cited above, but also in others of long standing. Thus in *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, Division 4 limited the applicant's service to transportation by barge, that being the type it had furnished, and said: "Classification of carriers in terms of their type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights of water carriers subject to Part III of the act." And the necessity of such classification to execute the Congressional intent to preserve grandfather rights and prevent the expansion of monopoly to upset the balance existing up to 1940 is stressed in detail in cases such as *Erie & St. Lawrence Corp. Contract Carrier Application*, 260 I.C.C. 235, 238, and *Norfolk, Baltimore and Carolina Line, Inc., Ext.—James R.*, 265 I.C.C. 247, 253, 254, affirmed on this point by the entire Commission, 265 I.C.C. 313. Other cases, too numerous to mention, have been cited to us where the Commission has acted either to grant both freighting and towing rights by careful and specific mention of each or by specific grant of operation in the performance of towage alone. And the Supreme Court has sustained such certificates, albeit without discussion of this specific point. See *Warner v. United States*, 341 U. S. 907, affirming on motion, D.C.W.D.

Tenn., 97 F. Supp. 580 (referring to this specification on p. 582), which sustained 265 I.C.C. 543; *United States v. Detroit & Cleveland Nav. Co.*, 326 U. S. 236, sustaining the certificate in 260 I.C.C. 175.

In making these classifications the Commission has relied not only on § 304(c) quoted in crucial part above, but also on § 309, dealing with the issue of certificates of public convenience and necessity. Thus subd. (c) of § 309 provides that the Commission shall issue a certificate "to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if the Commission finds that the applicant is fit [etc.], * * * and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." And subd. (d), requiring the certificate to specify routes, also provides that "there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this chapter or those established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation."

Plaintiff stresses the reliance of the Court in the *Seatrain* case on the proviso as preventing the limitation of facilities and service. But we agree with the Commission that this points up the difference between the two cases and affords a final ground of distinction between "service" as there considered and defined, and scope of operations as here pro-

vided. The proviso prevents forbidding new and better equipment and facilities to carry out the operations "within the scope of such certificates"; it does not authorize an expansion of operations beyond the grandfather rights set out in subd. (a) of this section or the classification authorized by § 304 (c). We agree with the Commission that it cannot carry out the purpose and intent of Part III if such indefinite expansion as contemplated by the plaintiff is allowable against the Commission's finding of a public interest to the contrary. Specifically there will be set at naught the intent of the grandfather clause, as defined by the Court in the provisions as to motor-carriers. *Crescent Express Lines* v. *United States*, 320 U. S. 401; *Noble* v. *United States*, 319 U. S. 88. Even though these cases may not be complete precedents for the reasons stated in the *Seatrain* case, yet they do state the use of the grandfather clause to preserve "the position which the carrier had obtained in the nation's transportation system." *Noble* v. *United States*, *supra*, 319 U. S. at page 92. Here Cornell and Hutton had operated without friction apparently for generations in their respective spheres on the Hudson; it would be indeed ironical if under cover of an act designed to preserve that parity, plaintiff was enabled to upset it quite completely.

We agree, therefore, with the Commission's assertion of power to make the classification in question. We should add that had we been in more doubt we should have nevertheless felt in some compunction to yield to the Commission's informed judgment and settled rulings on a matter so much within its competence. *United States* v. *Detroit & Cleveland Nav. Co.*, *supra*; *Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535, 536.

Decision of this basic issue settles the case. Plaintiff attempts to rely further on the provisions of § 314, 49 U.S.C.A. § 914, authorizing a carrier to make allowances in its tariffs for services rendered by a shipper in connection with the transportation furnished, and so separately supports the allowances made in its tariff for the shipper's scows. But obviously this deals with lawful transportation; it does not override earlier sections to make that lawful

which is unlawful. The Commission was not overstepping its powers under this section to pass upon the reasonableness of the allowances; it never got to that question in making its decision that the entire operation was illegal. *Emery Transp. Co.* v. *United States*, D.C.S.D. Ohio, 91 F. Supp. 644, 646, affirmed 339 U. S. 955.

Plaintiff raises two further points which seem not to have been raised, or in any event pressed, below. The first is that the Commission's statement of findings, conclusions, and ruling are somehow inadequate under the terms of § 8(b) of the Administrative Procedure Act, 5 U.S.C.A. § 1007(b). This objection seems to border on the frivolous, particularly as it is entirely general, without any indication how the plaintiff has been harmed or about what it is left in doubt. Whatever the reach of the A.P. Act, we think the findings entirely adequate and complete, indeed praiseworthily so. The other is the claim that the Commission lacks jurisdiction because the transportation in question was in intrastate commerce. But this claim was specifically set at rest in *Cornell Steamboat Co.* v. *United States*, *supra*. The New Jersey state line starts at the middle of the Hudson River from a point north of Yonkers down past New York City, and the transportation is in interstate commerce.

Accordingly the defendants must have judgment. The clerk is directed to enter judgment for the defendants, dismissing the action on the merits, immediately on the filing of this opinion.

CHARLES E. CLARK,
U. S. Circuit Judge;

STEPHEN W. BRENNAN,
U. S. Circuit Judge;

JAMES T. FOLEY,
U. S. District Judge.

Dated September 15, 1952.

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SUPREME COURT, U. S.

No. 488

In The

Supreme Court of the United States

October Term, 1952

THE COLLEGE BOOK EQUIPMENT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA and
THE TARIFF COMMISSION,
Appellees.

On Appeal From the United States District Court
for the Northern District of New York

BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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In The

Supreme Court of the United States

October Term, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court for the Northern District of New York

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BRIEF OF APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

I. INTRODUCTION

Pursuant to the provisions of Rule 7, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellant, The Callanan Road Improvement Company, opposes the joint motion to affirm of the United States

of America and Interstate Commerce Commission and a similar motion of Cornell Steamboat Company, an intervening defendant. In the jurisdictional statement and its assignment of errors appellant has specified five principal points wherein the District Court committed error. The questions of law which appellant contends are substantial, five in number, were set forth in its statement as to jurisdiction and filed as a part of the appeal herein. For the purpose of this brief in opposition to the motions to affirm, the questions raised by the appeal will be restated in the same order as appeared in appellant's jurisdictional statement.

II. THE INTERSTATE COMMERCE COMMISSION MAY NOT MODIFY OR PARTIALLY REVOKE A CERTIFICATE ISSUED TO A WATER CARRIER BY INCORPORATING IN SAID CERTIFICATE BY REFERENCE OR OTHERWISE A CLASSIFICATION OF WATER CARRIERS

Appellant's certificate, which it acquired from its predecessor in interest, Joseph R. Hutton, permits it to operate as a common carrier by water in interstate or foreign commerce, by self-propelled vessels and by non-self propelled vessels with the use of separate towing vessels. This certificate, in its present form, was reissued to appellant's predecessor in interest by the Commission on March 7, 1944.[1]

The Commission's order complained of herein prohibits the use of shippers' barges by appellant on the theory that the manner of use of these barges by appellant constitutes towage, a classification of water carrier service

[1] The earlier certificate issued by the Commission to appellant's predecessor in interest was dated July 17, 1942 and was later cancelled and revoked by the Commission without notice to appellant's predecessor.

which the Commission has made. This classification does not appear in appellant's certificate nor does the certificate contain reference to it. Under these circumstances, appellant has contended that the Commission is without authority to incorporate, by interpretation or otherwise, one of its orders or decisions in an outstanding certificate because to do so would constitute a modification or revocation of a certificate issued to a water carrier, and this the Commission is not legally authorized to do.

The United States and the Commission in their joint motion state merely that appellant's certificate was issued to it in 1947.[2] The United States and the Commission contend that a partial modification or revocation of appellant's certificate has not resulted because the Commission has held that water carriers whose certificates do not specifically authorize towage are without authority to engage in such service. This contention ignores the position of appellant. The question is whether or not the classification of water carriers which it is contended the Commission has made may be incorporated in a water carrier certificate. Appellant is aware of the finding of the Commission in the *Campbell* case as to the distinction between towage and freighting, but that decision can have no application to appellant's certificate for the reason that the decision is not incorporated by reference or otherwise in appellant's certificate.

The District Court, although the question was urged at length by appellant below, did not pass on this contention. The District Court held that the Commission is authorized to classify water carriers under section 304(c) of the Interstate Commerce Act. The relation of the classification of water carriers to a certificate of a water

carrier, however, is the question for decision and not the authority of the Commission to make the classification in the first instance.

As will be explained later herein, the Commission may not modify, revoke or suspend a certificate issued under part III of the Interstate Commerce Act to a water carrier as it may in the case of a certificate issued to a motor carrier under part II of the Interstate Commerce Act. This very definite limitation on the part of the Commission to directly revoke or modify a certificate should not be permitted by indirect means such as the incorporation by interpretation of a classification of water carriers which has the effect of restricting the type of service a water carrier may perform or the method or manner in which the water carrier may operate.

The Commission has been most careful in its regulation of motor carriers under part II of the Interstate Commerce Act not to revoke or modify certificates by incorporation of classifications, decisions or orders. The Commission has exercised caution in this regard even though under part II of the Interstate Commerce Act it has specific authority to revoke a motor carrier certificate. An example of the Commission's caution in regulating the affairs of motor carriers appears in its decision in *Coastal Tank Line, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289. This case involved the sole question of whether the Commission could incorporate its order classifying motor carriers in a certificate held by Charlton Bros. which would have the effect of restricting or modifying the certificate authorized therein. The certificate of Charlton Bros. authorized it to transport general commodities with certain named exceptions. The named exceptions did not include the transportation of commodities in bulk. Years after the certificate was issued to Charlton Bros. it commenced for the first time the transportation of petroleum products, in bulk, in tank trucks. A com-

plaint was immediately filed against Charlton Bros. by a carrier of petroleum products in tank trucks alleging in substance that Charlton Bros. should not be permitted to transport petroleum products in tank trucks because it had never done so in the past. In defense of this transportation Charlton Bros. relied solely on its certificate. In reply to this position the complainant contended that the Commission's decision in *Classification of Motor Carriers of Property*, 2 M.C.C. 703, should govern and take precedence over the actual terms of the certificate. Charlton Bros. countered with the contention that this policy would amount to a partial revocation of its certificate. In the *Charlton Bros.* case the Commission held unequivocally that:

> "The definitions of commodity groups in the *Classification* case hardly can have greater significance *when they are not referred to in the certificate.*" (Page 305). (Emphasis supplied)

In the *Charlton Bros.* case the Commission recognized specifically that when the certificate was originally issued to the defendant its right to transport petroleum products in bulk should have been excluded since there was no evidence that the defendant had engaged in this type of transportation before the "grandfather" period. The Commission concluded, however, that since petroleum products in bulk were not excluded it could not do so at a later date by interpretation because a modification of the certificate would result (48 M.C.C. 302).

Appellant does not question the right of the Commission to classify water carriers under section 304(c) of the act which the District Court held the Commission could do. Appellant does contend, however, that once a certificate is issued to a water carrier which does not within its four corners contain a reference to a classification of water carriers that the Commission may not at a later date incorporate by interpretation or otherwise such a

classification which would have the effect of partial modification or revocation of the certificate. The District Court did not pass on the question but merely limited its consideration to the right of the Commission to classify water carriers. The question for decision goes a step further than the District Court's opinion and it is for that reason that appellant respectively submits that the question is of a critical importance to water carriers generally. If this question is left in its present unanswered or unsettled state, the Commission will be at liberty to make other classifications of water carriers in the future and to apply those classifications on the same basis as it has here, namely, if an outstanding certificate did not specifically authorize a classified type of service then under those circumstances the holder would not be permitted to render the service in question. Appellant respectfully contends that no clearer case of modification or revocation of a certificate of a water carrier could be created.

The motion of Cornell Steamboat Corporation in reply to the first point of appellant does not deal with the point of incorporation of classification of water carriers in a certificate. Instead, the motion of Cornell Steamboat Corporation deals generally with the proceedings of the Commission where the distinction between freighting and towage had been established. Again appellant states that such a difference has been established by the Commission but the critical point is that this difference, although established as a classification matter must be incorporated in a certificate.

III. THE COMMISSION IS NOT AUTHORIZED U THE INTERSTATE COMMERCE ACT TO SP CIFY THE SERVICE TO BE RENDERED BY WATER CARRIER OR THE TYPE OF EQUI MENT TO BE USED BY SUCH CARRIER

The District Court, after concluding that the Commi mission is authorized under the Interstate Commerce A to classify water carriers,[3] held that such classificatio would not amount to a regulation of "the details of ser ice" (107 Fed. Supp. 185 at 189). In the appellant statement as to jurisdiction and in its assignment of e rors it is contended that the District Court erred in fai ing to hold that the Commission's order of October 1 1951 as affirmed by order dated March 17, 1952 does i fact constitute an effort on the part of the Commissio to specify the service to be rendered by a water carrie

The United States and the Commission in their join motion contend that water carriers do not all perform th same type of service and that a carrier should not be per mitted to engage in any and all types of service. Corne Steamboat Company contends that section 309(d) of th act permits the Commission to limit the service to b rendered under a certificate issued to a water carrier This contention, as will presently appear, is in conflic with the clear holding of this Court in *United States* v *Seatrain Lines*, 329 U. S. 424.

The answer to the question of whether or not the Com mission may specify the type of service a water carrier may or may not carry on is not only found in the Inter state Commerce Act applicable to water carriers but also

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[3] As noted under the preceding heading, however, the District Court failed to answer the question as to whether the Commission could incorporate a classification of water carriers in a certificate where the certificate did not contain specific reference to the classi- fication.

in the opinion of this Court in the *Seatrain* case, *supra*. Section 309(d) of the act applicable to *water* carriers provides that the Commission may specify the route or routes over which, or the ports to or from which a water carrier may be authorized to operate. The same section prohibits the imposition of any term, condition or limitation as shall restrict the right of a carrier to add to its equipment, facilities or service within the scope of its certificate as the development of its business and the requirements of the public shall require. The same or similar provisions are contained in section 208(a) of the Interstate Commerce Act applicable to *motor* carriers. However, under section 208(a) which is practically word for word with section 309(d), the Commission is required to specify the service to be rendered in a certificate issued to a motor carrier, whereas that authority or requirement is missing in section 309(d).

In the *Seatrain* case this Court passed on the question of whether the Commission could specify the service to be rendered by a *water* carrier. In the *Seatrain* case, as in this case, one of the questions was whether or not the Commission could confine a water carrier to a particular type or classification of service, i.e., a "car-ferry service." The same type of question is presented in this case as to whether the Commission may confine the appellant to a freighting operation. The Commission contended that it could regulate the details of Seatrain's service under the provisions of section 309(d) to fix terms, conditions and limitations. This Court in the *Seatrain* case expressed doubt that the Commission could under this authority have imposed a restriction in the original certificate of Seatrain as to the type of service it could have utilized to serve its shippers best. In expressing this doubt this Court, speaking through Mr. Justice Black, said that it is of significance that the Commission is not empowered to grant a certificate to a

water carrier which specifies the service to be rendered. The authority of the Commission under part II of the act applicable to *motor* carriers to specify the service to be rendered was particularly referred to in the comparison of the separate parts of the Interstate Commerce Act.

The *Seatrain* case, as noted, involved a particular type of service which the Commission had said did not come within the meaning of general common carriers by water, more particularly, car-ferry was held by the Commission to be a distinct type of operation. This type of an operation is as much a classification of a water carrier service as is the Commission's distinction between freighting and towing. Nevertheless, it was held by this Court in that case that the Commission could not specify the service to be rendered by a water carrier in attempting to differentiate between a car-ferry service and a general common carrier service, because of the absence in part III of the act of the right on the part of the Commission to specify the service to be rendered.

The first certificate issued to appellant's predecessor in interest on July 17, 1942 made no effort to specify the type of equipment the carrier could utilize. In the proceeding which it reopened on March 7, 1944, without notice, the Commission stated that the purpose of its action was to specify the type of vessels appellant's predecessor could use.

It is obvious that the absence of a valid limitation as to equipment in its certificate would permit the appellant to use the shippers' barges without regard to whether the use of these barges constituted a towage or freighting service. The subsidiary question is presented, therefore, as to whether the Commission may specify the equipment to be used by a water carrier. Both the Commission and the District Court failed to answer this question. It is the appellant's position that since the Commission may

not specify the *service* to be rendered in a certificate issued to a water carrier it necessarily follows that the Commission may not specify the equipment to be used by a water carrier.

It is clear from the decisions of this Court and of the Commission under Part II of the act that the right to specify the type of equipment to be used flows directly from the right to specify the service to be rendered. In *Crescent Express Lines* v. *United States*, 320 U. S. 401, it was contended by appellant that the Commission's action in restricting it to the use of certain types of equipment was contrary to the statute, illegal and unlawful. This case involved a motor carrier. In overruling the contention of the motor carrier this Court held that:

> "Since Section 308 requires the Commission to specify the service to be rendered, this could not be done without power to also specify the general type of vehicle to be used."

The *Crescent Express Lines* case is the one this Court referred to in the *Seatrain* case when it held that the Commission is not authorized to prescribe the service of water carriers as it might do with respect to motor carriers because of the Commission's lack of authority to regulate the details of the service of a water carrier.

The Commission has frequently recognized its right to specify the type of equipment a motor carrier might use under part II because of its right to specify the service to be rendered by a motor carrier. In *Nudelman Common Carrier Application*, 28 M.C.C. 91, the Commission restricted the carrier to sedan type of equipment; in *Miller Extension of Operations*, 21 M.C.C. 401, the Commission granted a certificate restricted to the use of tank trucks; in *Myers Common Carrier Application*, 23 M.C.C. 451, a certificate was restricted to the transportation of automobiles in drive-away service; in *Central Truck-*

Away System, Inc., 8 M.C.C. 275, the certificate was restricted to merchandise transported in motorcycle traffic cars, with panel bodies; in *Billy Baker, Common Carrier Application*, 24 M.C.C. 805, the authority granted was restricted to the use of dump trucks; in *Barrows Common Carrier Application*, 19 M.C.C. 179, the certificate was restricted to the transportation of not more than six passengers per trip; in *Mercer and Dunbar Common Carrier Application*, 13 M.C.C. 683, the certificate was restricted to the use of armored truck service; and in *Smoky Mountain Tours Company*, 27 M.C.C. 435, the carrier was prohibited from using open-top equipment. All of these restrictions were justified on the theory of the Commission to specify the service to be rendered by a motor carrier. Since the Commission does not have that right under part III, however, it necessarily follows that neither does it have the right to specify the equipment a water carrier might use.

The United States and the Commission in their joint motion referred to the general provisions of section 304(c) which section provides that the Commission may establish from time to time just and reasonable classifications of groups of carriers. This general authority is not a limitation on or curtailment of the provisions of section 309(d) of the act, which section is a counterpart of section 208(a) permitting the specification of service to be rendered in a motor carrier certificate. Section 304(c) has to do with the general powers and duties of the Commission, whereas section 309(d) has to do solely with certificates of public convenience and necessity and permits. Although the Commission is permitted to establish from time to time such just and reasonable classifications of groups of carriers under its general powers and duties, it is restricted in establishing rules, regulations and requirements to be observed by carriers so classified or grouped except only *after hearing* as is found necessary

or desirable in the public interest. Appellant respectfully submits that the Commission has not complied with the provisions of section 304(c) referred to by the United States and the Commission in their joint motion for the reason that the Commission has not, after hearing, established rules, regulations and requirements to be observed by carriers classified or grouped. Until this requirement is met, any effort on the part of the Commission to enforce rules and regulations as to groupings or classifications of carriers must necessarily fail. In this respect the holding of the District Court as to the power of the Commission to make the classification in question is clearly in error as any rule, regulation or requirement emanating therefrom cannot be enforced until after a hearing for that purpose.

Furthermore, it seems clear that the Commission should not be permitted to use its classification powers under section 304(c) as a substitution for the power to prescribe types of service which is not conferred under section 309(d). For instance, the Commission might well in the future make a distinction between a harbor operation and a line-haul operation of a water carrier and thereafter refuse to allow a water carrier to engage in either or both types of operation. This type of restriction in service was attempted in the *Seatrain* case; has been enforced in this case and might well be attempted or enforced in the future. These are the reasons why appellant has contended in its statement as to jurisdiction that this point, as well as the others, presents a substantial question of importance to the water carrier industry generally.

IV. THE INTERSTATE COMMERCE COMMISSION MAY NOT SUSPEND, REVOKE, MODIFY OR ALTER A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY ISSUED TO A WATER CARRIER UNDER PART III OF THE INTERSTATE COMMERCE ACT

Appellant has contended in its statement as to jurisdiction that the Interstate Commerce Commission may not revoke a certificate issued to a water carrier under part III of the act. When this point was presented to the District Court, it held that "it would seem that the Commission might act in any event to correct a certificate having the obvious legal ambiguity of the first Hutton certificate" (107 Fed. Supp. 188). The District Court also concluded that since appellant's predecessor in interest did not object to the Commission's action in revoking the earlier certificate, the Commission could legally do what might otherwise be beyond the scope of its statutory authority. It is believed that these positions are clearly erroneous as a matter of law.

Joseph R. Hutton, appellant's predecessor in interest, was issued a certificate by the Commission dated July 17, 1942, authorizing operations as a common carrier within a described territory along the Hudson River, the New York State Barge Canal and the Niagara River, including the Oswego branch. This certificate did not specify the type of service to be rendered or the type of vessels to be used, nor was there any ambiguity or obscurity with respect to the broad scope of operation which it authorized. The certificate provided that it was to become effective and be in force from and after October 5, 1942. This certificate was issued to appellant's predecessor in interest after a full and complete hearing at which hearing counsel for certain intervening carriers as well as counsel for the Interstate Commerce

Commission appeared and participated. Counsel for the Interstate Commerce Commission did not challenge or question the findings of the Commission and the certificate of July 17, 1942 became effective and in full force after October 5, 1942. Thereafter and without notice to anyone, the Commission by order dated March 7, 1944 reopened the proceeding for reconsideration and simultaneously with the release of this order a report and amended certificate were issud by the Commission wherein the earlier certificate of appellant's predecessor was superseded and cancelled. The amended certificate of March 7, 1944 restricted the operations of appellant's predecessor to the use of self-propelled vessels and non-self-propelled vessels with the use of separate towing vessels. This is the action appellant complains of and this is the action which the District Court held the Commission could do to correct an "obvious legal ambiguity of the first Hutton certificate" and because Hutton "waived objection."

A similar contention was advanced by the Commission in the *Seatrain* case, *supra*. There it was argued that the Commission had the right to correct an "inadvertent error," patent on the face of the record. This Court held; however, that the Commission's action in the *Seatrain* case was not an "inadvertent error" but was for the purpose of executing a new policy which had been announced in *Re Foss Launch and Tug Company*, 260 I.C.C. 103. The procedural facts in this case are identical with those in the *Seatrain* case. In the *Seatrain* case the Commission issued a certificate permitting the transportation of general commodities without restriction between New York, N. Y., and New Orleans, La., and Texas City, Texas. In this case a similar certificate was issued to appellant's predecessor. On December 18, 1943 the Commission ruled for the first time in the *Foss Launch* case, *supra*, that a certificate to carry "commodities generally" did not authorize the carriage of loaded or unloaded

freight cars, a so-called car-ferry service. On December 14, 1943 the Commission ruled for the first time in the case of *Campbell Transportation Company Common Carrier Application* that "carriers whose certificates or permits do not specifically authorize the performance of towage are without authority to engage in such service." These two policy decisions were decided within four days of each other.

Immediately following its decision in the *Foss* case the Commission by order dated January 27, 1944 reopened the proceeding in the *Seatrain* case for hearing on the sole question of whether or not the earlier certificate should be modified so as to specifically authorize the applicant to operate as a common carrier in a so-called car-ferry service which the Commission had held in the *Foss* case not to be included under the authority of a certificate to carry commodities generally. In this case no such opportunity was offered to appellant's predecessor. The first notice appellant's predecessor had of the Commission's intent to modify his certificate was the release of the amended certificate which cancelled and superseded the earlier certificate. It would seem, therefore, that this difference in the matter of procedure in the two cases should make a sharp distinction as to the matter of protest which was made in the *Seatrain* case but which was not made in the case of appellant's predecessor. In the *Seatrain* case the Commission promptly proceeded to incorporate the distinction which it had made in its Foss decision so as to limit Seatrain's operations to a car-ferry service and a related operation. The same step was taken by the Commission with respect to the certificate of appellant's predecessor. In both cases the Commission's certificate had become effective.

This court held in the *Seatrain* case that the Commission was without authority to revoke the certificate issued by the Commission. It was stated that:

"The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress." (329 U.S. 432-433)

If the certificate in the *Seatrain* case was not subject to revocation in whole or in part when the time for rehearing it had passed, certainly the certificate of appellant's predecessor was subject to the same statutory limitations as to the power of the Commission to revoke or modify it.

The District Court infers, however, that the earlier certificate of appellant's predecessor contained an "obvious legal ambiguity." It is respectfully submitted that there was no ambiguity in the earlier certificate as it described in clear and concise terms the scope and extent of the operation intended to be authorized. No question was raised concerning the certificate of appellant's predecessor until the Commission announced a new policy in the *Campbell* case where it was held for the first time that unless a certificate specifically authorized the performance of towage such a service could not be performed. This holding constituted a definite departure from an earlier holding in *Eastern Transportation Company*, 250 I.C.C. 505, 635, where the Commission held that special authority to tow shippers barges in the transportation of commodities generally under part III of the act was not necessary because authority would be granted authorizing the transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels. In the *Campbell* case the Commission reversed its policy announced in the *Eastern* case, just as in the *Seatrain* case the Commission was enforcing a new policy announced in the *Foss* case. The holding of this Court in the Seatrain case that "thus it seems apparent that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute a new policy announced in the Foss Case" is applicable here in that the only reason for the Commission's action in reopening the pro-

ceeding in the case of appellant's predecessor was to incorporate the new policy announced in the *Campbell* case. Under these circumstances it cannot be said that a legal ambiguity was involved in the first certificate of appellant's predecessor.

The District Court, as a second ground, upheld the Commission's action in revoking the certificate of appellant's predecessor because no objection was raised to this action. This finding poses the question as to whether or not the Commission may perform an act which it is not legally entitled to do under the statute if no objection is raised thereto by an interested party. Otherwise stated, can silence confer jurisdiction on the Commission where jurisdiction would not exist if a protest was raised. This Court held unequivocally and without qualification or reservation in the *Seatrain* case that the issuance of a certificate marks the end of a proceeding. When the certificate has been finally granted and the time for rehearing it has passed, it is not subject to revocation in whole or in part except as specifically authorized by Congress. Since Congress has not seen fit to authorize the Commission to revoke certificates,[4] that result may not be accomplished directly or indirectly, either with or without the consent of the certificate holder. The Commission has held that it is without authority to disturb a certificate issued to a wafer carrier once it has become effective. See *Detroit & Cleveland Navigation Company*, 265 I.C.C. 506.

The District Court seemed to give much weight to the fact that in the *Seatrain* case the carrier objected to the Commission's procedure whereas in this case no such ob-

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[4] In fact, the Commission through the Chairman of its legislative committee, the late Joseph B. Eastman, specifically disclaimed any desire for revocation authority under part III of the Act. See report of Senate Interstate and Foreign Commerce Committee on Bill S-2009.

jection was raised. The inference is that if objection is not raised the Commission can exercise authority which would be denied it in the event of objection. We cannot believe that this Court would require an affected party to complain in order to prevent the validating of an otherwise invalid act by the Commission.[5]

In any event, the procedural steps in the *Seatrain* case and in this case were quite different as to matters of notice and opportunity to be heard. In the *Seatrain* case, as noted, the Commission issued a notice calling "the attention of applicant therein * * * to the fact that the certificate issued probably does not properly describe the operations of Seatrain Lines, Inc. on and since January 1, 1940." This notice was followed by an order of January 27, 1944 stating the purpose of the further hearing so that the applicant would be put on notice. In this case, however, no such opportunity was afforded appellant's predecessor. Its first notice was the receipt of the amended certificate which cancelled and revoked the earlier certificate.

It is unreasonable to assume that applicant's predecessor, situated on the Hudson River, could have appreciated the distinction which the Commission was attempting to enforce. Certainly he had little, if any, opportunity to look into the matter when all water carrier services in coastwise operations were practically abandoned during World War II. Mr. Hutton's death followed in January, 1945 before the conclusion of the war. In any event the District Court seems to impose an obligation or duty on appellant's predecessor in spite of the fact that the Commission itself was unable to reach a definite position with

[5] Although the District Court also referred to the absence of any objection by the appellant at the time of the transfer of the Hutton certificate thereto; it seems clear that the appellant, without regard to any objection, acquired whatever rights existed under the certificate prior to the transfer.

respect to towage. As noted in the *Eastern* case the Commission held that separate towing authority was not necessary, whereas in the *Campbell* case the same body reversed its earlier decision and held to the contrary. Certainly a small Hudson River operator cannot be held accountable for his failure to understand and appreciate these technical distinctions.

The District Court seems to lay great stress on the fact that the Commission's action in revoking and cancelling the earlier Hutton certificate was justified on the theory that Hutton and his successors should not be allowed to operate in a manner after January 1, 1940 (the so-called grandfather date of the act) if the same type of service was not provided before that date. Nevertheless, this same theory was rejected by this Court in the *Seatrain* case. In the *Seatrain* case the Commission found on the basis of the evidence presented to it that the operations of the carrier prior to January 1, 1940 (the grandfather date) consisted of the operation of special type of equipment for carrrying property loaded in railroad cars. It was claimed that other types of operations had been conducted but the Commission found that the applicant had not at any time "handled freight in any manner other than in railroad cars loaded on its vessels with the exception of a small amount of liquid cargo handled in the tanks of the vessels with which they are especially equipped." The Commission further found "it is clear, so far as this record shows, that the commodities transported by applicant were loaded in railroad cars and handled between New York and New Orleans in non-break-bulk service by means of special type of equipment operated by it" (260 I.C.C. 434, 435).

Seatrain in the case before the Commission claimed that it had handled general commodities and had published and maintained the tariff schedules naming a full line of classification and commodity rates. In answer to

this argument the Commission held that "The mere fact that it participates in such tariffs do not establish that it handled freight by means other than in railroad cars." As to the operation between New York and Texas City referred to in the District Court's opinion, this service was instituted between January 1, 1940 and February 1, 1941, a so-called interim service which was allowed to be continued until an application for a certificate had been disposed or by the Commission. This operation, however, was carried on by the Seatrain type of vessel. The Commission held "the record amply supports the conclusion that the methods of operation between New York and Texas City were similar to those from New York to New Orleans" (Page 437). The Commission held specifically and unequivocally that

> "the record shows that in the transportation of commodities generally by self-propelled vessels, all traffic, other than liquid cargoes in bulk and empty railroad cars, handled by applicant, has been transported in railroad cars received from or delivered to rail carriers. Much emphasis was placed by applicant in the several proceedings before us upon the peculiar advantages of the through transportation made possible by its special type of vessel and operations. Applicant, according to the record, limited itself to that class of operations."

The Commission then concluded that

> "the authority granted clearly and specifically should cover the operations in which applicant was engaged on the 'grandfather date' are those instituted during the interim period. This is essential to preserve its position in the national transportation system. See *United States* v. *Carolina Freight Carriers Corporation*, 315 U. S. 475. *Crescent Express Lines, Inc.* v. *United States*, 320 U. S. 401 and cases cited therein" (260 I.C.C. 437).

The District Court placed much emphasis on the necessity of maintaining a parity between future and past operations of carriers subject to the jurisdiction of the

Commission. The District Court found as a matter of fact that appellant and its predecessor should not be allowed to engage in towage if such operations were not performed before the grandfather date. In making these findings, however, the District Court apparently confused the facts in the *Seatrain* case where the same identical result was accomplished in that Seatrain was permitted to engage in a vastly different operation after the grandfather date than it had engaged in before that date. In discussing the *Seatrain* case (107 Fed. Supp. 188) the District Court found that Seatrain had long been a common carrier by water. It had developed a distinctive type of service in ferrying freight cars received from railroads. The Court then held "But, and this is important, it also carried commodities generally." It is respectfully suggested that this finding is in error and it is plainly contrary to the undisputed evidence of record before the Commission. As previously pointed out, the Commission held that Seatrain had not in fact engaged in an operation before the grandfather date or during the interim period other than in a car-ferry service, and, because of this fact and in reliance upon the *Crescent Express Lines* case, (which the District Court also relied on) the Commission justified its action in restricting Seatrain's certificate for future operations to a car-ferry service. Appellant respectfully submits that the District Court has confused the facts in the *Seatrain* case as to the scope of that carrier's activity before the grandfather date. Seatrain Lines never performed a general commodity common carrier service other than in a railroad car-ferry operation which was held by the Commission in the *Foss* case to be a distinctive type of service. However, in spite of that fact Seatrain was authorized to indulge in a far greater scope of operations after the grandfather date than it had provided before that time under an act designed to preserve the parity of past and future operations which the District Court relied on in this case.

Once a certificate is issued it may not be recalled by the Commission and certainly it may not be recalled to invoke a new doctrine or policy. The fact that a certificate may authorize a broader scope of service for future operations than had been performed in the past as was done in the *Seatrain* case is no ground for revocation of the certificate except in the case of inadvertence, fraud or mistake. The matter of whether appellant's predecessor performed towage service as that term was eventually understood and described by the Commission before January 1, 1940 is therefore immaterial once the certificate had been issued.

Appellant respectfully urges that the District Court and the Commission have failed to follow and apply correctly the doctrine of the *Seatrain* case. There can be no doubt but that a certificate was issued after full and mature consideration on its part. There can be no doubt that the Commission changed its policy as to freighting versus towage and thereafter incorporated that policy in a new certificate. There can be no doubt that appellant's predecessor had no opportunity to protest this matter before the Commission acted, and thereafter, because of war conditions and the untimely death of appellant's predecessor no further opportunity was afforded. There can be no doubt that the District Court's fear as to parity of service in the future as in the past does not apply here since the same question was involved in the *Seatrain* case and overruled. For these reasons the Commission and the District Court have acted contrary to this Court's decision in the *Seatrain* case and probable jurisdiction should be noted by this Court for the purpose of correcting that error.

V. THE COMMISSION HAS FAILED TO COMPLY WITH THE PROVISIONS OF SECTION 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT

Appellant has made certain contentions before the Commission in justification of its position. These contentions are (a) that the Commission may not specify the service to be rendered by a water carrier and the type of vessels such a carrier may use; (b) that the Commission may not revoke a certificate issued to a water carrier; (c) that the Commission may not by interpretation modify or partially revoke a certificate issued to a water carrier, and (d) that the Commission's order complained of by appellant amounts to a modification or revocation of the allowance provisions of section 314 of the act. The Commission did not see fit to pass on these questions but instead elected to confine its consideration of the matter before it to the question of whether or not appellant's activities on the Hudson River in fact constituted a towage service rather than a freighting service. The Commission made detailed findings of fact and conclusions as to this latter position, but it did not make similar findings of fact and conclusions as to the four points outlined above which were submitted by appellant for interpretation and consideration. Accordingly, this point was raised in appellant's complaint and presented to the District Court in support of its prayer for reversal of the Commission's order. The District Court held that the Commission's findings were "entirely adequate and complete, indeed praiseworthily so." These findings, however, dealt only with the single issue which the Commission chose to discuss in its report, i.e., the question of towage versus freighting. Appellant does not complain of the Commission's affirmative findings under this point. Instead its complaint is directed to the Commission's failure to make requested findings and conclusions on the other points.

Section 8(b) of the Administrative Procedure Act requires that decisions of administrative agencies shall contain findings and conclusions upon all material issues of fact, law or discretion presented on the record and the appropriate rule, order, sanction, relief or denial thereof. The failure of the Commission to apply this rule constitutes a violation of section 8(b) of the Administrative Procedure Act. In this regard it may be said that the District Court failed to make findings of fact and conclusions upon all of the issues of law and fact presented upon the record to it. In the case before the District Court appellant contended that the Commission's order complained of constitutes a revocation or modification of appellant's certificate as it now stands. This argument was advanced on the theory that appellant's certificate does not contain a reference by incorporation or otherwise of the Commission's order classifying water carriers. The District Court failed to pass on this question. Accordingly, the same omission is presented in its opinion as appellant complained of with regard to the Commission's report.

The District Court's opinion appears to be in conflict with the opinion of a Three-Judge Statutory Court in the case of *Atlanta and St. Andrew's Bay Rwy.* v. *United States*, 104 Fed. S. 193. In that case it was held specifically that section 8(b) of the Administrative Procedure Act is applicable to the Interstate Commerce Commission. In this case the District Court's decision overlooks the requirement that the Commission shall include a statement of findings and conclusions as well as the reasons or basis therefor upon all material issues of fact, law or discretion presented on the record. Under this provision the Commission has no alternative but to make these findings and conclusions, and its failure to do so conflicts with the provisions of section 8(b) of the Administrative Procedure Act.

VI: THE COMMISSION'S ORDER CONSTITUTES A REVOCATION OR MODIFICATION OF SECTION 314 OF THE INTERSTATE COMMERCE ACT

Section 314 of the Interstate Commerce Act states that if the owner of property transported by a water carrier directly or indirectly furnishes any service connected with such transportation or furnishes any instrumentality used therein, the charge or allowance therefor shall be published in tariffs or schedules as provided by part III of the act. Pursuant to these provisions appellant published certain allowance provisions in a tariff filed with the Commission applicable in instances where the shipper furnished a scow or barge for the transportation of its goods by appellant. This activity was defined by the Commission to constitute towage and not freighting. In its report the Commission laid down certain rules or regulations whereby a water carrier holding only freighting rights could use equipment furnished by a shipper. These rules are impossible of compliance by a water carrier such as appellant if the allowance provisions of the act are to be observed and because of this fact it is appellant's contention that the Commission has in effect modified or revoked the allowance provisions of section 314. In so doing, the Commission has established a rule of its own making and has preferred that rule to a provision of the Interstate Commerce Act.

The Commission has criticized the provisions of appellant's tariff because (1) appellant may not utilize the scows furnished by shippers on return movements, (2) that demurrage and free-time rules of appellant's tariff do not apply in instances where shipper furnished equipment, and the requirement that appellant must return the shipper's scow to the point of origin. These requirements are impossible of compliance by a carrier and shipper for the reason that it would be necessary for the

shipper to surrender complete control of the scow or barge to the carrier for use by the carrier as it saw fit. The only way these rules and regulations can be met by a carrier and shipper is for a charter or lease of equipment agreement to be entered into between the carrier and shipper and under those circumstances there would be no need or necessity for the application of the allowance provisions of the act. Otherwise stated, the Commission by its order will force or compel shippers and carriers to lease or charter equipment, which of course, is a very common practice.

Appellant submits that section 314 of the act has a very definite place in the regulatory scheme of transportation. Allowances have prevailed in the railroad field for years and years. In the regulation of that type of transportation the Commission has not attempted to create certain classes or types of operations which railroads may or may not perform and then prohibit the application of section 15 (13) of the act (the corresponding part of section 314) when railroads and shippers desire to avail themselves of the provisions of that section. In interpreting section 15(13) of the act this Court in the case of *Interstate Commerce Commission* v. *Diffenbaugh*, 222 U. S. 41, 46-47, held that the only restriction of this section is that the carrier must pay the owner of instrumentalities furnished for its use an amount that is no more than reasonable, and the only permissive element is that the Commission may determine the maximum to be paid in case there is complaint. This Court held further that "As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

The Commission has stated that it is an agency of limited powers and authority; that these powers and au-

thorities do not extend beyond expressed enactment or its fairly implied inferences and that the power of the Commission should not be interpreted so as "to permit what in effect is a modification of a separate provision of the act" (See *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, 471).

There is no provision of section 314 that a water carrier must possess a certain type of certificate before the provisions of section 314 may be applied as between carrier and shipper. The plain matter of the fact is that the Commission made a distinction between towage and freighting without reckoning with the provisions of section 314 of the act and it now seeks to preserve that distinction even though to do so will nullify section 314.

VII. CONCLUSION

Appellant is gravely concerned with the Commission's order in this case as it constitutes the exercise of administrative action far in excess of statutory authority. The same basic principles, only more aggrieved, are presented in this case as were presented in the *Seatrain* case. The Commission has committed the same unauthorized acts in this case as were committed in the *Seatrain* case. In addition, the Commission has committed other violations either directly or indirectly.

This court has not had the occasion to pass on questions of the Commission's authority in regulating the affairs and operations of a water carrier since the *Seatrain* case. Appellant respectfully submits that an affirmance of the principles announced in that case is required at this time, for otherwise the Commission will be permitted to impose the same conclusions and results in the future as have been imposed in this case. The joint motion of the United States and the Interstate Commerce

Commission and the motion of Cornell Steamboat Company to affirm should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing reply brief was served upon counsel for the parties by mailing a true copy of said brief to such counsel this 12th day of December, 1952.

.....

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No. 488

IN THE

Supreme Court of the United States

October Term, 1952

THE CALLANAN ROAD IMPROVEMENT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR THE CALLANAN ROAD IMPROVEMENT COMPANY

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WILSON - ERA PRINTING CO. - RE. 7-6005 - WASHINGTON 1, D. C.

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BRIEF FOR THE CALLANAN ROAD IMPROVEMENT COMPANY

OPINION BELOW

The opinion of the District Court (R. 59-71) is reported in 107 F. Supp. 184.

JURISDICTION

The final judgment of the District Court was entered on September 15, 1952 (R. 78). The petition for appeal was presented and allowed on November 7, 1952 (R. 74). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b). Probable jurisdiction was noted on February 2, 1953 (R. 80).

QUESTIONS PRESENTED

Appellant in its assignment of errors and in its statement as to jurisdiction has outlined the questions presented in this case. These questions all involve the statutory authority of the Interstate Commerce Commission to revoke a certificate of public convenience and necessity issued to a water carrier pursuant to the provisions of part III of the Interstate Commerce Act, even though the Commission is not granted this right under the statute. Furthermore, the right of the Interstate Commerce Commission to in effect revoke a certificate by indirect means or to specify the service to be rendered in a certificate issued to a water carrier is also presented for decision. Two additional questions are also presented, one involves the failure of the Commission to adhere to the provisions of section 8(b) of the Administrative Procedure Act and whether or not the Commission may have revoked or modified the provision of section 314 of part III of the act by the enforcement of its order complained of herein. These questions may be stated as follows:

(1) Whether the Interstate Commerce Commission may revoke, in whole or in part, an outstanding certificate of public convenience and necessity issued to a water carrier under part III of the Interstate Commerce Act even though that part does not specifically empower the Commission so to do;

(2) Whether, even in the absence of statutory authority to revoke such a certificate in whole or in part, the Interstate Commerce Commission may accomplish the same result indirectly by incorporating in the certificate by reference or otherwise a classification of water carriers which has the effect of reducing the type of operations the carriers may otherwise perform.

(3) Whether the Interstate Commerce Commission may specify the service to be rendered or the type of

equipment to be used by water carriers operating under certificates issued pursuant to part III of the Interstate Commerce Act, even though this part does not specifically authorize the Commission so to do.

(4) Whether the Commission's order complained of by appellant has the effect of revocation or modification of section 314 of the Interstate Commerce Act, and

(5) Whether the Interstate Commerce Commission has failed to comply with the provisions of section 8(b) of the Administrative Procedure Act in that the Commission and its examiner failed and refused to make required findings and to state reasons or basis upon each finding, conclusion and exception presented by appellant upon material issues.

STATUTES INVOLVED

The pertinent provisions of parts II and III of the Interstate Commerce Act, 24 Stat. 379 as amended, 49 U. S. C. 301, 901 et seq., and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001 et seq., are as follows:

Interstate Commerce Act

Part II

Sec. 212. (a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated

thereunder, or with any term, condition, or limitation of such certificate, permit, or license: Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204 (c), commanding obedience to the provision of this part, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder.

Part III

Section 309. (a) Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: Provided, however, That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect.

(d) Such certificate shall specify the route or routes over which, or the parts to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter,

there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: Provided, however, That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

Sec. 304. (c) The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms "common carrier by water", or "contract carrier by water", as the special nature of the services performed by such carriers shall require; and such just and reasonable rules, regulations, and requirements consistent with the provisions of this part to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest.

Sec. 314. If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

Administrative Procedure Act

Sec. 8. (b) Submittals and Decisions.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decision (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement or (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

STATEMENT

Appellant is the successor in interest to Joseph R. Hutton, formerly of Kingston, New York, now deceased (R. 16, 21). On May 31, 1941, Mr. Hutton filed an application with the Interstate Commerce Commission under the so-called "grandfather" clause of section 309(a) of part III of the Interstate Commerce Act for authority to continue operating as a water carrier in the transportation of commodities generally. The application was assigned for a formal hearing before the Interstate Commerce Commission and counsel for the Commission and other interested parties appeared and participated (R. 7). After full consideration of the evidence presented by Mr. Hutton in support of his application the Commission issued a certificate and order which became effective on and after October 5, 1942, authorizing operations as a common carrier by water in interstate or foreign com-

merce between points on the Hudson River and other waters not here pertinent (R. 9-10).

Approximately a year and a half thereafter, on March 7, 1944, the Commission on its own motion and without prior notice issued an order reopening the record in the earlier proceeding for reconsideration (R. 10) and simultaneously with the release of this order issued its report on reconsideration. The justification given in the report for this action was that the Commission had not specified the type of vessels to be used by Mr. Hutton (R. 11). Accordingly, the Commission on its own motion superseded and cancelled Mr. Hutton's earlier certificate of July 17, 1942, and in lieu thereof issued an amended certificate which for the first time specified the equipment to be used by Mr. Hutton; i. e., self-propelled vessels and non-self-propelled vessels with the use of separate towing vessels (R. 13-14). This action occurred during the height of World War II and at a time when practically all coastwise shipping had been suspended. Mr. Hutton died January 23, 1945 following a surgical operation in November, 1944. His widow was unable to conduct the business of her deceased husband and thereafter made attempts to dispose of the assets of his estate, including the certificate issued by the Commission (R. 16): Finally, after negotiations, appellant, a New York Corporation incorporated in 1895, filed a joint application with the Commission for the transfer and purchase of Mr. Hutton's certificate (R. 14-21). It appeared that the transferee, appellant herein, was engaged in the production of road-building material and agricultural limestone. Among other corporate powers appellant is authorized by its charter to own and lease vessels and to do a towing business. In 1930 appellant began shipping stone by water with chartered scows towed under contract.

The Interstate Commerce Commission held a formal hearing on the application of appellant to purchase Mr.

Hutton's certificate through his administratrix. The application was opposed by an association of water carriers (R. 15). The evidence showed that appellant informed the Interstate Commerce Commission at the time of this hearing that it would continue to handle its own business with the freight of other shippers intermingled in tows on the Hudson River between, generally, Waterford and New York City (R. 18). The association of water carriers which was protesting the approval of the transfer was composed of members of three classes, including a general towing division (R. 18). Evidence presented by this protestant referred to other towing companies on the Hudson River (R. 17). Since it appeared that appellant did not desire to operate on the New York State barge canal system, the towing companies included in the protesting association appeared to be satisfied (R. 19).

In due course appellant inaugurated service on the Hudson River as the successor in interest to Joseph R. Hutton. It filed a tariff with the Interstate Commerce Commission which became effective on April 17, 1949. This tariff made provision for allowances as are contemplated and authorized in section 314 of the Interstate Commerce Act providing in substance that if the owner of property transported by a water carrier renders any service directly or indirectly the charge or allowance therefor by the carrier shall be published in tariffs filed with the Commission. The tariff of appellant so filed with the Commission provided that if shippers of brick furnished to appellant the scows for the movement of brick, a stated amount would be allowed the shipper for the use of the scow. Certain changes were made from time to time in the level of the rates but the allowance provisions of the tariff continued in effect until ultimately ordered cancelled by the Commission.

On May 11, 1949 a competitor of appellant, The Cornell Steamboat Company, complained to the Commission that appellant was engaged in the service of towage on

the Hudson River and that this service was not authorized by the appellant's certificate. Appellant was of the opinion that its certificate was not limited in any respect as to the type of operations it could perform. This was particularly so because the certificate authorized the use of non-self-propelled vessels (barges and scows) and towing vessels (tugs). Appellant requested a formal interpretation of its certificate by the Commission. In a report and order of Division 4 of the Commisison dated October 18, 1951, (R. 22) as affirmed by an order of the entire Commission dated March 17, 1952, (R. 34) the Commission held that appellant was engaged in a towing operation which it was not allowed to perform because its certificate did not specifically authorize towage (R. 32).

In an action to enjoin and set aside the order of the Commission requiring cancellation of the allowance provisions of appellant's tariff the United States District Court for the Northern District of New York held that the Commission was authorized to revoke the certificate of appellant's predecessor in interest because of an obvious legal ambiguity and because appellant's predecessor in interest did not object to the Commission's action. The Court held, however, that it preferred to predicate its decision on the broader ground of the Commission's power to classify water carriers (R. 65). The Court did not, however, pass squarely on the question of whether the Commission could incorporate a classification of water carriers in an outstanding certificate which would have the effect of a partial modification or revocation and neither did it pass on the question of whether the Commission could as a matter of law specify the service to be rendered or the equipment to be used in a water certificate. The Court did hold that the Commission had not overstepped its power regarding the allowance provisions of the act and that its order was not in violation of section 8(b) of the Administrative Procedure Act (R. 70).

SUMMARY OF ARGUMENT

The primary points relied on by appellant are (1) that the Commission may not directly or indirectly revoke an outstanding certificate of a water carrier and (2) that in any event the Commission is precluded from restricting appellant's operating authority by prescribing, or by specifying the service it can perform or the equipment it can use. Two subsidiary points involve the statutory power of the Commission to in effect revoke the provisions of section 314 of the Interstate Commerce Act (49 U. S. C. 914) and whether or not the Commission and its examiner failed to comply with the provisions of section 8(b) of the Administrative Procedure Act (5 U. S. C. 1007(b)).

(1) The *Commission's Lack of Revocation Powers.* In *U. S.* v. *Seatrain Lines,* 329 U. S. 423, 91 L. Ed., 396, this Court held that the Commission is without authority to revoke a certificate issued to a water carrier under part III of the Interstate Commerce Act except where issued by reason of inadvertance, fraud, or mistake. It is apparent that the first certificate issued to the appellant's predecessor in interest was not so issued. The certificate was issued after a formal hearing in which counsel for the Interstate Commerce Commission participated. Exceptions were not taken to the report of the Commission by any party to the proceeding including the Commission's counsel. Accordingly, the initial certificate of July 17, 1942 became effective as proposed in the order on October 5, 1942. Appellant's predecessor did not restrict the scope of authority requested in his application to a particular type or classification of service with the use of a particular type or class of equipment. The certificate was issued as requested and authorized operations as a common carrier in the transportation of general commodities.

The District Court held, however, that this certificate contained an "obvious legal ambiguity" (R. 65). As will be indicated later in this brief, there was no ambiguity in the certificate. The Commission's act was directed solely to an effort on its part to incorporate in the certificate a policy which it had announced a few months before as to the distinction between a freighting operation and a towing operation. The same effort was made by the Commission in the *Seatrain* case, and this Court refused to uphold the Commission on the theory that it was attempting to incorporate a new policy in an outstanding certificate rather than correct an error. The District Court also justified the Commission's action in revoking the earlier certificate of appellant's predecessor in interest on the ground that no objections were made. Appellant contends that failure to object does not confer jurisdiction on an administrative agency to do an act which would otherwise be illegal or unlawful.

In addition to the foregoing, the authority of the Commission to effect *indirectly* a revocation of an outstanding certificate by incorporating therein a classification of water carriers is presented for determination. The District Court predicated its decision on the power of the Commission to make classifications of water carriers (R. 65, 70). Appellant does not dispute the existence of this general power but it does contend that such power can not be used to curtail the scope of a certificate already outstanding. Otherwise, the Commission could use this technique to acquire and exercise powers of revocation not conferred on the Commission.

(2) The *Commission's Lack of Authority to Specify Services or Equipment.* The District Court did not come to grips with the question of whether or not the Commission could specify the service to be rendered by a water carrier or the equipment to be used by a water carrier. This Court held in the *Seatrain* case that the Commission

is not authorized to specify the service to be rendered by a water carrier. This is a second ground of distinction between the Commission's authority under part II of the act applicable to motor carriers and under part III of the act applicable to water carriers. Since the Commission does not have the right to specify the service to be rendered under part III, it does not have the right to restrict appellant's operations to particular types of vessels. The decisions under part II are clear that the right to specify equipment stems from the right to specify services. Since the latter basic right is not conferred under part III, it follows that the subsidiary right to specify equipment is also lacking under that part. Accordingly, since the Commission may not restrict appellant's operations to the use of non-self-propelled vessels with separate towing vessels (*not* a definition of towage), appellant is free to engage in any type of common carrier service, including towage.

(3) *Subsidiary Points.* Appellant's fourth and fifth points concern the failure of the Commission to observe the requirements of section 8(b) of the Administration Procedure Act and the effect of the Commission's order as resulting in modification or revocation of the allowance provisions of section 314 of the Act because of the impossibility as a practical matter of compliance with its requirements.

ARGUMENT

I

THE DISTRICT COURT ERRED IN FAILING TO SET ASIDE THE COMMISSION'S ORDER ON THE GROUND THAT ITS ACTION IN REVOKING OR CANCELLING THE CERTIFICATE OF APPELLANT'S PREDECESSOR IN INTEREST WAS ILLEGAL AND VOID.

As noted, appellant's predecessor in interest was issued a certificate by the Commission on July 17, 1942, which became effective and in force from and after October 5, 1942. This certificate authorized appellant's predecessor in interest to operate as a common carrier by water in interstate or foreign commerce in the transportation of commodities generally between specified points on the Hudson River and points on the New York State Barge Canal including the Oswego branch and the Niagara River. This certificate did not specify the type of equipment appellant's predecessor was authorized to use nor did the certificate classify the type of service appellant's predecessor was authorized to render other than as a common carrier. This certificate was issued by the Commission after a full and complete hearing in which counsel for the Interstate Commerce Commission as well as counsel for other parties appeared and participated. Petitions or other pleadings in the nature of an appeal were not filed by any party to the proceeding, and, accordingly, the certificate in question became effective and in force on and after October 5, 1942. For the reasons which will be explained shortly, the Commission, by order dated March 7, 1944 and on its own motion, reopened the proceeding and simultaneously with the release of this order, a report on reconsideration was issued by the Commission. Attached to the report was an amended certificate and order which cancelled and superseded the

certificate and order dated July 17, 1942. It was stated in the report on reconsideration that the prior report did not specify the type of vessels to be used by appellant's predecessor but it is apparent that the real reason for the Commission's action in this regard was to incorporate for the first time a new policy which had been announced on December 14, 1943, or three months earlier.

The District Court held that the Commission could act "to correct a certificate having the obvious legal ambiguity of the first Hutton certificate" (107 F. Supp. 188; R. 85). This conclusion does not appear to be supported by the record. The purpose of the revocation or cancellation of the earlier certificate was an effort on the Commission's part to incorporate a new policy or doctrine which had been established for the first time on December 14, 1943; i.e., that a carrier whose certificate does not specifically authorize the performance of towage is without authority to engage in this type of service. Prior to the decision of the Commission in *Campbell Transportation Company*, 260 I.C.C. 107, decided December 14, 1943, the Commission held that separate authority to tow shippers' barges in the transportation of commodities generally under part III of the act was not necessary. This decision was rendered in *Eastern Transportation Company*, 250 I.C.C. 505, 635, in which it was concluded by the Commission that:

> "Authority to perform such transportation does not limit applicant to the use of its own non-self-propelled vessels, and the authorization should not be interpreted as forbidding the use of other barges or scows in the transportation. In order to effectuate a flexible and coordinated transportation system, carriers of this type should be able to use non-self-propelled vessels which are chartered from others, interchanged with other carriers, or owned by shippers".

Later, however, the Commission reversed its decision in the *Eastern* case by concluding in the *Campbell* case that towage and freighting operations are different types of services and carriers whose certificate did not specifically authorize towage are without authority to engage in that type of service. This decision was the reason why the Commission cancelled or revoked the earlier certificate of appellant's predecessor on March 7, 1944, and substituted in lieu thereof a certificate which was designed for the purpose of distinguishing a freighting service from a towing service.

Appellant contends that the action of the Commission in cancelling or revoking the certificate of its predecessor was improper and void because the Commission is not authorized under part III of the Interstate Commerce Act to revoke a certificate issued to a water carrier. Furthermore, the action of the Commission in this case is in conflict with the holding of this Court in *United States* v. *Seatrain Lines*, supra. The facts in the *Seatrain* case are so remarkably similar to the facts in this case that more than passing consideration is justified. Seatrain Lines filed an application under the so-called grandfather clause of part III of the Interstate Commerce Act (just as appellant's predecessor did in this case). By report and certificate dated July 2, 1942, the Commission found that Seatrain was in bona fide operation as of January 1, 1940 (the grandfather date) in the transportation of commodities generally as a common carrier by self-propelled vessels between New York and New Orleans. This certificate was not questioned by the Commission until its decision in *Foss Launch & Tug Co. Applications*, 260 I.C.C. 103, decided December 18, 1943, or just four days after the *Campbell* case was decided. In the *Foss* case the Commission held for the first time that freight car ferry service is a special kind of transportation not embraced within the term "transportation of commodities generally" by water. Authority to engage

in this type of service according to the Commission's finding must be specifically granted in each case (260 I.C.C. 105). Accordingly, the Commission proceeded to reopen the long closed case of Seatrain Lines and after reconsideration (260 I.C.C. 430) the certificate of July 2, 1942 was ordered cancelled and superseded and a corrected certificate was ordered issued to Seatrain restricted to the transportation of property loaded in railroad cars, of empty railroad cars, and of liquid cargoes in bulk.

Up to this point the facts in the *Seatrain* case and in the case of appellant's predecessor are identical. Each was issued an unrestricted certificate in July, 1942, following a formal hearing conducted by the Commission. In both cases the Commission in other proceedings (the *Foss* case and the *Campbell* case) held that a certificate to transport general commodities did not include the right to engage in certain types of services established for the first time in each of those cases. The two policy cases were decided within four days of each other; the *Campbell* case on December 14, 1943 and reported at 260 I.C.C. 107, and the *Foss* case on December 18, 1943 and reported at 260 I.C.C. 103. Thereafter, by order dated January 27, 1944, the Commission reopened the Seatrain case for further hearing and in its order stated the purpose of the further hearing. In this case the Commission issued an order dated March 7, 1944, reopening the proceeding for reconsideration and simultaneously issued a report and amended certificate, thus affording appellant's predecessor no opportunity to contest the order prior to its release.

In the *Seatrain* case the Commission contended before this Court that it could as a matter of law change or limit the earlier certificate. The Commission contended furthermore that it could, under its power to fix "terms, conditions and limitations" as provided for in section 309(d) of the act, exercise this power without effecting a

partial revocation of Seatrain's certificate. This Court, speaking through Mr. Justice Black, disagreed with the contentions of the Commission. While recognizing that the Commission could correct clerical mistakes in a certificate this Court found that the real purpose of the Commission's action was to invoke its new policy announced in the *Foss* case. This Court held therefore that the Commission was without authority to cancel the earlier certificate of Seatrain stating that "the certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress" (329 U.S. 432-433). This decision is based squarely on the proposition that the Commission may not revoke a water carrier certificate.

The legislative history of part III of the Interstate Commerce Act was relied on by this Court in the *Seatrain* case, particularly statements of Commissioner Eastman before the Senate Committee on Interstate and Foreign Commerce. Commissioner Eastman explained that while the power to revoke certificates of motor carriers under part II of the act was essential, such power was not necessary in the regulation of water carriers. It is obvious from this legislative history that the absence of revocation powers in part III was intended by Congress. This Court quite properly, therefore, refused to permit the exercise of such power in the *Seatrain* case either directly, or indirectly under the Commission's power to fix terms, conditions and limitations under section 309(d).

Nevertheless, the District Court in the instant case held that the Commission was authorized to cancel the original Hutton certificate in order to correct an "obvious legal ambiguity" contained therein. The same contention was made by the Commission in the *Seatrain* case before this Court. In the *Seatrain* case, however, this Court pointed out that the Commission did not reopen

the *Seatrain* case for consideration until after its decision in the *Foss* case, wherein for the first time it was held that a certificate to carry commodities generally did not authorize water carriage of loaded or unloaded freight cars (329 U.S. 429). "Thus it seems apparent [this Court said] that the Seatrain proceedings were reopened not to correct a mere clerical error, but to execute the new policy announced in the Foss case." This Court supported its conclusion in that regard by the fact that the Commission had affirmatively rejected an earlier contention that Seatrain's vessels could be classified as "car-ferries" and instead had concluded that they were ocean-going vessels.

In respect of the instant case it should be noted that the Commission had concluded in the earlier *Eastern* case that specific authority to tow shipper's barges was not required. Therefore, a carrier having the right to transport general commodities could indulge in all types or classes of water carrier operations. Appellant respectfully submits that the Commission's cancellation of the earlier Hutton certificate was for the sole purpose of discarding the policy enunciated in the *Eastern* case and instead applying the new policy announced to the appellant's predecessor in the *Campbell* case. Appellant further submits that this purpose, rather than that of correcting a mere error, is equally as clear here as this Court found it to be in the *Seatrain* case. Accordingly, there is no authority to support the Commission's action complained of herein and its order that appellant is engaged in a towing operation not authorized by its certificate should be vacated and set aside.

It is apparent that the District Court's rejection of appellant's position was also based on the proposition that appellant should not be authorized to engage in a towage operation in the future which it or its predecessor had not in fact conducted in the past. Appellant con-

tends, however, that the District Court erred in this regard because this very argument was rejected by this Court in the *Seatrain* case.

In the *Seatrain* case the Commission endeavored to restrict Seatrain's operating authority to a car-ferry service, notwithstanding the fact that such water carrier had since the grandfather date held a certificate of public convenience and necessity to carry commodities generally. The record in that case discloses that Seatrain had not in fact operated in the latter capacity prior to the grandfather date of its certificate. This Court, however, held that Seatrain could not be deprived of its authority to supplement its car-ferry service then in operation with the general common carrier type service proposed to be inaugurated by the carrier.

Thus it is apparent that the holding in the *Seatrain* case is clear precedent for a similar holding herein. Actually the District Court's contrary viewpoint grew out of its *erroneous* observation that Seatrain had "carried commodities generally" prior to the grandfather date. This finding is plainly contrary to the undisputed evidence of record before the Commission in the *Seatrain* proceeding, as reflected in the Commission's finding on this point:

> "the record shows that in the transportation of commodities generally by self-propelled vessels, all traffic, other than liquid cargoes in bulk and empty railroad cars, handled by applicant, has been transported in railroad cars received from or delivered to rail carriers. Much emphasis was placed by applicant in the several proceedings before us upon the peculiar advantages of the through transportation made possible by its special type of vessel and operations. Applicant, according to the record, limited itself to that class of operations."

Even Seatrain had contended that prior to January 1, 1940 (the grandfather date) it had published and

maintained tariff schedules naming a full line of classification and commodity rates. The Commission rejected this tariff argument as being tantamount to the actual performance of general commodity services, holding that "the mere fact that it participates in such tariffs does not establish that it handled freight by means other than in railroad cars." In short, the *Seatrain* decision is controlling on this point. The action of the District Court is inconsistent therewith and should be reversed.

The second major point relied on by the District Court in justification of its failure to follow the Seatrain decision of this Court was the fact that appellant's predecessor, contrary to Seatrain, failed to object to the Commission's action in revoking the earlier certificate. The Court seems to say that in the absence of objections the Commission may revoke a certificate of a water carrier, whereas if a carrier objects, then, under the doctrine of the *Seatrain* case, the Commission would be denied this right. Appellant respectfully contends that there is no justification for conferring jurisdiction on an administrative agency in this manner when Congress itself has not specifically seen fit to do so.

Further, it should be noted that no warning or opportunity was afforded appellant's predecessor to object to the Commission's action prior to the simultaneous release of an order reopening the earlier record and the release of a report and amended certificate which cancelled or revoked the earlier certificate. The Commission did not state that the purpose of its action was to prohibit or prevent appellant's predecessor from engaging in a towing operation, thereby putting the holder of the certificate on notice as to the exact reason for the Commission's subsequent action. In the *Seatrain* case, however, the Commission issued a notice assigning the application for further hearing. Seatrain was formally advised that its certificate no longer properly described its operations.

The order assigning the application for further hearing stated that the issue involved was whether or not the earlier certificate of July 2, 1942 should be modified so as to limit applicant's operations to the "Seatrain" type of vessel. Thus Seatrain was put on advance notice as to the purpose and reason for the Commission's action. Since Seatrain had been issued an unrestricted certificate it was fully informed as to the purpose of the Commission's action in reopening the case and it was in a position to object.

The facts are very different, however, with regard to the Commissions' procedure in this case. It must be remembered that the Commission itself had vacillated in its policy regarding the necessity of a separate and distinct authorization for towing operations. In the *Eastern* case, it had specifically held that separate towing authority was not required, but in the *Campbell* case the Commission reversed itself and held to the contrary. In the meantime, however, appellant's predecessor, located on the Hudson River and certainly unfamiliar with the technical aberrations which the Commission had seen fit to indulge in, would have been required, if the District Court's opinion on this subject is to prevail, to have exercised a greater degree of skill and regulatory understanding than the Commission itself was exercising during the same period. It was during this period of time that World War II was at its height and domestic shipping had been practically abolished. The Commission's order of March 7, 1944 came at a time when it could have aroused the least excitement as far as Hutton's future operation was concerned. Moreover, after a surgical operation in November, 1944, appellant's predecessor died on January 23, 1945. His widow had had nothing to do with and knew little about the business, and therefore attempted to sell the certificate of her deceased husband (R. 16). These efforts finally culminated in an application to the Interstate Commerce Com-

mission for the transfer and sale of the certificate. The sale was finally approved August 18, 1947 (R. 14), and an amended certificate modified only as to the territorial scope, i.e., the elimination of operations on the New York State Barge Canal System, was finally issued on February 5, 1948 (R. 27). Certainly, under these circumstances, appellant's predecessor should not be criticized, when the Commission itself was uncertain as to the status of towing operations.

The District Court also appeared to rely on appellant's failure to raise any question regarding towage authority when the Hutton certificate was transferred to it. Appellant respectfully submits that in its opinion the facts of record do not support this conclusion. The report of the Commission in *Joseph R. Hutton Certificate Transfer* (R. 14-22) indicates clearly that the protesting carriers were of the opinion that the certificate of appellant's predecessor in interest permitted towing throughout the territory authorized to be served. The protestant, the Northeastern Inland Waterways Association, was described by the Commission as "an association of water carriers having members of three classes, including a division operating on the New York State Canal System and *a general towing division* (R. 18) (Emphasis supplied). In testimony for the association in opposition to the approval of the application mention was made of other carriers having authority to perform towage along the Hudson River (R. 17). The interest of the association was directed primarily to transportation on the New York State Canal System. That business, according to the Commission's finding, appeared to be the protestant's primary concern and its objection to the proposed transfer "would be largely satisfied by limitation of the superseding certificate to the river operation and to the commodities which transferee expects to transport" (R. 19).

Appellant disclosed to the Commission in the proceeding involving the transfer of Mr. Hutton's certificate that it was authorized by its charter to engage in a towing business; that it began shipping crushed stone by water in 1930 with chartered scows towed under contract (R. 17), and that it would continue to handle its own business "with the freight of other shippers intermingled in tows" (R. 18). Under these circumstances it seems very clear that there was no occasion for appellant to consent to a restriction as to the type of service, as distinguished from scope of service, which the certificate authorized. The protesting water carrier association representing towing companies fully understood that the certificate of Mr. Hutton authorized towage on the Hudson River as well as the New York State Canal System. The opposition of this association was directed primarily to a towage operation by appellant on the New York State Barge Canal System because "there now is a dearth of tonnage on the canals" (R. 19). Appellant emphasizes that all parties to the transfer proceeding understood that towage was authorized. Limitation of territory satisfied the opposition of the protestant but this limitation in no way restricted the scope or type of service to be rendered in the remaining territory along the Hudson River. In view of this very clear understanding by all of the parties to the transfer proceeding, appellant respectfully submits that the finding of the District Court that "plaintiffs present attempt to expand its grant is an obvious afterthought stimulated by exigencies with its competition with Cornell" is erroneous. In any event, appellant advances the same contention on this point as was made regarding the question of laches by Hutton—an action otherwise illegal as beyond the scope of statutory authority does not become valid and subsisting merely for want of challenge. Such a theory is clearly contrary to sound governmental administration because it has the effect of encouraging an agency

to exceed its statutory powers if it anticipates no resistance to such action. Moreover, appellant succeeded to whatever rights and privileges existed under the Hutton certificate prior to the transfer, except the territorial modification, and should not be precluded from now trying to validate the authority illegally quashed by the Commission prior to such transfer.

In short, appellant respectfully submits that there is no real or substantial difference between the facts of this case and those of the *Seatrain* case, and that the Commission's action restricting the appellant from towing operations is invalid. Accordingly, the appellant, as the successor in interest, is entitled to a certificate equivalent in scope to that of the original Hutton certificate, subject only to the territorial modification of February 5, 1948.

II

THE DISTRICT COURT ERRED IN FAILING TO HOLD THAT THE COMMISSION MAY NOT MODIFY OR PARTIALLY REVOKE A CERTIFICATE ISSUED TO A WATER CARRIER BY INCORPORATING IN SAID CERTIFICATE A CLASSIFICATION OF WATER CARRIERS

The Interstate Commerce Commission, as noted under the preceding heading, is not authorized to revoke or cancel a certificate issued to a water carrier under part III of the act after the certificate has become effective and in force. This limitation on the power of the Commission is due to the fact that Congress did not include a section providing for revocation of certificates in part III of the act as it did in part II of the act. Under this section of the brief the right of the Commission to accomplish by indirect means the same result which it is denied by direct means; i.e. partial revocation of an outstanding certificate by incorporation of a classification of water carriers, will be discussed.

Appellant contended before the Commission and before the District Court that incorporation in an outstanding certificate of a classification of water carriers either by reference or by interpretation has the same effect as an outright modification or revocation of the certificate. The Commission did not pass on this question. The District Court held that the Commission has the power to classify water carriers and thereafter to limit the services to be rendered by water carriers pursuant to such classification. In reaching this conclusion the District Court did not answer the contention of appellant that illegal revocation of a certificate under these circumstances would result. The District Court merely concluded that the Commission has the right under section 304(c) of part III of the Interstate Commerce Act to classify water carriers. This authority is not disputed by appellant. Appellant is aware that the Commission has in numerous instances specifically authorized water carriers to engage in a towing operation. On the other hand, appellant points out that the Commission has in many instances granted certificates to water carriers which did not specify the type of service to be rendered (in fact, the authority of the Commission to specify service to be rendered in a water certificate will be questioned under the next heading).

Section 304(c) of part III of the act is practically identical with section 204(b) of the act applicable to motor carriers. Both sections authorize the Commission to classify carriers of property as to type of carrier, type of service, and type of commodity transported. Pursuant to this authority the Commission in *Classification of Motor Carriers of Property*, 2 M.C.C. 703, established various types of carriers and classes of commodities transported by motor carriers. That proceeding was conducted by the Commission in the beginning of its administration of part II of the Interstate Commerce Act and thereby has been a guide for all concerned. On the other hand, the Com-

mission has not seen fit to institute a similar proceeding concerning water carriers. Instead its classification of water carriers has been on a case to case basis and in many instances after a certificate was outstanding.

The Commission in its administration of part II of the act applicable to motor carriers has also been very careful not to in effect revoke a certificate of a motor carrier by incorporating a classification order in an outstanding certificate. This caution has been exercised even though the Commission has express statutory authority to revoke a certificate of a motor carrier. An outstanding example of the Commission's action in this regard is the case of *Coastal Tank Line, Inc. v. Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289. In this case Charlton Bros. held a certificate from the Commission authorizing the transportation of general commodities with certain exceptions. The certificate did not prohibit the right to transport petroleum products, in bulk, in tank trucks. This special type of operation had been classified by the Commission in its earlier *Classification* case as a separate and distinct type of operation and as a result the Commission consistently thereafter excluded such authority from newly issued certificates unless the carrier specifically proved that it had engaged in that type of operation on and since the grandfather date applicable to motor carriers.

The certificate of Charlton Bros. authorized the transportation of general commodities but no mention was made of the right to transport petroleum products, in bulk, in tank trucks. Several years later Charlton Bros. for the first time undertook the transportation of petroleum products in tank trucks in competition with existing carriers whose operations were confined entirely to that type of service. A complaint by Coastal Tank Line and others was filed with the Commission. The complainants contended that it was understood and recognized in the motor carrier field that bulk transportation with tank

trucks was a separate and distinct type of service and, therefore, that the Commission's action in the *Classification* case had nullified the right of Charlton Bros. to transport petroleum products. Charlton answered this contention with the argument that the incorporation of the *Classification* case holding in its certificate would constitute a partial revocation, an action to be taken only within the framework of section 212 of the act applicable to the revocation of motor carrier certificates. The Commission agreed with Charlton, stating as follows:

> "The definition of commodity groups in the *Classification* case hardly can have greater significance when they are not referred to in the certificate." (48 M.C.C. 305)

The Commission further held that variations in certificated operating authority, if dependent on the classification of motor carriers or on the basis of matters antecedent to the issue date of a certificate, would lead to instability in the motor carrier industry and uncertainty among the patrons as to the operating rights of motor carriers. The Commission went so far as to hold that the complainant's position could be sustained only if the certificate had excluded the rights to transport petroleum products in bulk in tank trucks at the time it was issued, finding however that "they were not and we may not now by interpretation, so modify the certificate" (48 M.C.C. 302). Thus, the *Charlton Bros.* case holds that the Commission may not incorporate a classification of motor carriers by reference or interpretation in an outstanding certificate which would have the effect of partial or complete revocation. The Commission recognized in this case that the scope of operations set forth in the certificate constitutes the authority of the carrier and that the certificate cannot be whittled away by interpretations or incorporation by reference of classifications which were not prescribed in the certificate at the time of its issuance.

The complainant in the *Charlton* case filed an action in the United States District Court for the District of Columbia to set aside the Commission's order. That Court on February 10, 1953 upheld the Commission's order and dismissed the complaint. (*Coastal Tank Line, Inc., et al* v. *United States of America, et al*, No. 2271-50). This decision gives judicial recognition of the Commission's decision in the *Charlton* case that a particular type of operation created for classification purposes may not be prohibited unless the carrier's certificate is specifically restricted. This decision is in conflict with the decision of the District Court in the instant case in that the District Court herein has justified a curtailment in operating authority under a classification order not included in the certificate or referred to therein.

Appellant contends that the Commission may look only to the certificate of the carrier, whether water or motor, to determine the scope of the authority of the carrier. In this case appellant is authorized even under its present certificate to transport general commodities with the use of non-self-propelled vessels (scows and barges) and separate towing vessels (tugs). This certificate does not state that the tugs may be used in a particular manner nor does it state that the barges may or may not be used in a particular manner. There is no reference in the certificate to any classification of water carriers nor is there any reference to the type or character of service which may be rendered other than as a common carrier. The legal authority conferred by the certificate may not be restricted by reading into that certificate a classification which is not referred to therein. Appellant submits that such action is no less a revocation of a certificate than direct action under section 212 for a motor carrier action not authorized under part III. If the Commission's authority to act as it has in this case is upheld the door will be open for similar action in the future. There would be no

limitation in that event on the Commission's right to establish other classifications of water carriers and thereafter to hold that carriers are without authority to engage in that particular type of service unless their certificates specificaly authorize such a service.

The *Charlton* case is not the only one in which the question of the Commission's authority to interpret certificates already issued to motor carriers has arisen. In *Campbell Sixty-Six Express, Inc.* v. *Frisco Transportation Company, et al.*, 46 M.C.C. 222, the defendant was charged with conducting an unauthorized operation. In deciding in favor of the defendant, the Commission held:

> "Section 208(a) of the act requires that any certificate issued under section 206 or 207 shall specify, among other things, the service to be rendered, and *motor common carriers and others interested are not required to go back of the certificates to determine the nature and extent of the service authorized.* Here we may look only to the certificates held by the transportation company to determine whether it is engaging in unauthorized operations" (Emphasis supplied).

In the *Campbell Sixty-Six* case, the Commission specifically recognized its limitations in going back of a certificate for interpretation purposes. Its acknowledged limitation that it "may look only to the certificates held by the transportation company to determine whether it is engaged in unauthorized operations" is the very same limitation which the Commission refused or failed to acknowledge in this case. The certificate of a carrier, be it a water carrier or a motor carrier, is the only instrument the Commission may refer to in resolving the question of legality or illegality of a particular operation.

In *Glendenning Motorways, Inc., Interpretation of Certificate*, 49 M. C. C. 440, the Commission was called on again to interpret a certificate issued under part II of the

act. This case involved the right of the carrier to use its certificate in a manner just as the instant case involves the right of appellant to use its certificate in a certain manner. In the *Glendenning* case, the Commission held that:

> "Clearly, we cannot as the complaining carriers would have us do, go back of the certificate and cut it down by restriction on the theory that it grants too much. A certificate granting certain rights including those described above, is outstanding and has been since December 30, 1946, and there is no evidence that the issuance thereof was through fraud or inadvertence."

Tidewater Transfer Company, Inc. Extension, Wines in Bulk, 47 M.C.C. 279, involved a certificate issued after Commission's decision in the *Classification* case wherein it was held that carriers of liquid petroleum products are engaged in a special service requiring the use of special equipment. This certificate was issued to the carrier without restriction as to the method or manner in which malt beverages or wines could be transported. In upholding the carrier's authority to engage in this specialized service the Commission said:

> "To hold now that applicant's unrestricted permit does not include the right to transport wines in tank vehicles would be reading into the permit a condition or limitation which does not exist and which would have the effect of a partial revocation of applicant's permit without benefit to it of the procedure provided in section 212(a) of the Interstate Commerce Act, as amended."

Here again the Commission refused to read into a motor carrier operating authority a restriction resulting from the *Classification of Motor Carriers* case, which was not incorporated or referred to in the certificate on the theory that such a restriction would constitute a partial revocation.

In *Valley Motor Lines, Inc.* v. *Western Truck Lines, Ltd.*, 47 M.C.C. 718, the Commission refused to amend or modify an outstanding certificate rejecting the contention of the complainant that the defendant did not have the authority to perform a certain service. In *Hudson Bus Transportation Company, Inc. Common Carrier Application*, 46 M.C.C. 9, the Commission held that a certificate which had become final and effective was conclusive because "any other conclusion would result in uncertainty on the part of certificate holders concerning the finality of their operating authorities" (p. 15).

In *Mutrie Transp., Inc. et al* v. *Blue Line Exp., Inc.*, 53 M.C.C. 530, the Commission held that:

> "The sole criterion of the extent of defendant's authority is the terms of the certificate, and it is immaterial whether defendant's predecessor intended to transport fuel oil at the time he filed his 'grandfather' application" (p. 533).

In *Detroit & Cleveland Navigation Company*, 265 M.C.C. 506, involving a water carrier, the Commission held that once a certificate has become effective it is without authority to disturb it. The Commission referred to the *Seatrain* case, *supra*, in justification of its holding that it is without authority to revoke or limit the operating rights granted to a water carrier.

In *Brady Transfer & Storage Company Extension*, 51 M.C.C. 770, the Commission held that it is neither necessary nor proper to implement a certificate by interpretation where the operating authority described therein is described in clear, unequivocal and unambiguous language. The certificate under review in the *Brady* case was upheld and the service in question was found to be authorized.

In summary the foregoing cases support appellant's position that no clearer case of revocation or modification of a certificate of a water carrier has been created than

by the failure of the District Court to set aside the Commission's order. This result would be accomplished by the Commission regardless of the fact that it does not have the right to modify or revoke certificates, and, in fact, it is seeking that right from Congress by amendment to part III of the Interstate Commerce Act. In its Sixty-Sixth Annual Report to Congress dated November 1, 1952, the Commission stated at page 137:

> "In each of our annual reports beginning with that for 1947, we recommended that part III of the act be amended by adding provisions for revocation of water-carrier operating authorities. The need for such authority was discussed at pages 50-51 of the report for 1949. That need still exists, and we are again recommending that part III be amended by adding after section 312 a new section 312a containing provisions for revocation of water-carrier certificates and permits."

In the same report the Commission recommended legislation by amendment of part III of the act "by adding after section 312 a new section (312a) containing provisions for revocation of water-carrier certificates or permits" (p. 147).

III

THE DISTRICT COURT ERRED IN FAILING TO FIND AS A MATTER OF LAW THAT THE COMMISSION IS NOT AUTHORIZED TO SPECIFY THE SERVICE TO BE RENDERED OR THE TYPE OF EQUIPMENT TO BE USED BY A WATER CARRIER.

Appellant has contended before the Commission and the District Court that the Commission is not authorized under part III of the Interstate Commerce Act to specify the service to be rendered or the type of equipment to be used by water carriers. The support for this argument

is the language of section 309(d) and this Court's decision in the *Seatrain* case, *supra*. The District Court held that this limitation could not operate to authorize an expansion of operations beyond the grandfather rights set out in section 309(a) of the act or the classification authorized by section 304(c) of the act. Appellant submits that there is no expansion of the grandfather rights of its predecessor in interest because its certificate, both original and as revised, does not permit an operation greater than the Commission intended to authorize.

The District Court's reference to section 304(c) having to do with classification of carriers has been dealt with under the preceding heading where it was shown that such a classification is ineffective to restrict a certificate issued without regard to such classification.

In the *Seatrain* case this Court compared the provisions of section 208(a) of the act applicable to motor carriers with the provisions of section 309(d) of the act applicable to water carriers. Section 309(d) of the act provides, among other things, that the Commission shall not impose any limitation or condition so as to restrict the right of the carrier to add to its equipment, facilities or service within the scope of its certificate as the development of its business and the demands of the public shall require. A similar provision is contained in sections 208(a) applicable to motor carriers. However, under section 208(a) the Commission is directed to specify the service to be rendered in any certificate issued under part II of the act, whereas that provision is missing under section 309(d) of the act applicable to water carriers. This Court recognized that very significant difference in the details of the Commission's authority to regulate the service of a motor carrier and a water carrier. In the *Seatrain* case it was noted specifically that section 309, "which empowers the Commission to grant certificates to water carriers does not authorize the Commission to specify 'the service to be

rendered' ". This Court also observed that section 309(d) referred to above would seem to preclude the Commission from incorporating any term or condition in a certificate which would deprive the public of the best type of service which a water carrier could render. This Court concluded that:

> "In view of this difference between the statutory authority of the Commission to prescribe the service of water carriers and of motor carriers, our decisions relating to the Commission's power as to motor carriers in this respect are not controlling as to the Commission's power to regulate the details of the service of water carriers" (329 U.S. 431, 432).

If the Commission is not authorized to specify the service to be rendered by a water carrier in a certificate issued under part III of the act, as was held by this Court in the *Seatrain* case, it necessarily follows that the Commission is without authority to deny appellant the right to engage in all types of common carrier operations. Furthermore, since the Commission derives its right to specify the type of equipment a motor carrier may use solely from its right to specify the service of a motor carrier, the absence of that right under part III would necessarily preclude the right to specify equipment to be used.

The Commission has authorized motor carriers to engage in a particular type of operation in a certificate issued under part II of the act. Similarly, it has prohibited motor carriers from engaging the certain types or classes of motor carrier operations. The Commission has predicated its authority in that regard solely on its right to specify the service to be rendered under part II of the act in certificates issued to motor carriers. For instance, in *Eastern Trails, Inc. Common Carrier Application*, 42 M.C.C. 21, 25, a motor carrier was denied the right in a certificate issued it by the Commission to

engage in a mass transportation type of service as distinguished from a long distance or trunk-line service. In justifying its action in restricting the carrier to a particular type of service the Commission referred to its authority under section 208(a) of part II of the act, stating:

> "The restriction recommended by the examiner which would prevent applicant from 'affording local service' between Newark and New York City is solely a limitation on the service which Eastern Trails, Inc. may render."

If the Commission has the right under part II of the act to prohibit a carrier from engaging in a particular type of service because of the right to specify the service to be rendered, it necessarily follows that the same right cannot be exercised under part III of the act when the same or similar provisions have not been incorporated in part III. The absence of the provision with respect to specification of service in part III is just as pertinent as the absence of the right to revoke a certificate in part III. This Court held in the *Seatrain* case that its decisions relating to the Commission's power to regulate the details of motor carrier service are not controlling as to the power of the Commission to regulate similar details of water carriers. In *Crescent Express Lines* v. *United States*, 320 U. S. 401, it was contended that the Commission's action in restricting a certificate issued to a motor carrier to the use of certain types of vehicles was contrary to the statute and illegal. This Court, however, held that:

> "Since section 308 (208 of the Interstate Commerce Act) requires the Commission to specify the service to be rendered, this could not be done without power to also specify the particular type of equipment to be used."

In view of this Court's decision in the *Crescent* case appellant submits that the Commission may not specify

the equipment to be used by a water carrier because it does not have the right to specify the service to be rendered.

It will be recalled that the original certificate of July 17, 1942 of appellant's predecessor in interest did not specify the equipment to be used. After the first certificate was cancelled or revoked a second certificate was issued to appellant's predecessor on March 7, 1944, which specified the equipment to be used as self-propelled vessels and non-self-propelled vessels with the use of separate towing vessels. Irrespective of the contentions advanced under point I regarding the validity of the Commission's action in revoking the earlier certificate and substituting the certificate of March 7, 1944, appellant, as a further point, here contends that the Commission lacked statutory authority to specify the equipment to be used by the carrier because of the absence of authority to specify the service to be rendered which this Court held in the *Crescent* case is essential if equipment is to be specified. If the Commission may not specify the equipment to be used, appellant would be free, even under the Commission's interpretation as to classification of carriers, to operate in any manner it may choose to as a common carrier.

As noted, the Commission itself has recognized in a long line of decisions that its right to restrict an operation authorized in a motor carrier certificate to the use of certain types of equipment comes solely from its right under part II of the act to "specify the service to be rendered" in a motor carrier certificate. In *Nudelman Common Carrier Application*, 22 M.C.C. 275, Division 5 of the Commission first held that it was without authority to specify the type of vehicles to be used by a motor carrier. Upon further consideration, 28 M.C.C. 91, 93, Division 5 of the Commission reversed itself, holding:

"We are of the opinion that our prior construction of section 208(a) was in error. Simply stated, under this section we are directed to specify in any certificate issued under section 206 or 207 of the act, among other things, 'the service to be rendered' ".

The Division said further:

"In other words, we clearly have the power and duty to specify in any certificate the service to be rendered, except that we may not attach maximum limitation to the quantity of the service to be rendered."

In conclusion it was stated:

"Thus, in numerous cases we have specified, or in effect specified, certain types of vehicles *in describing the particular service to be rendered* under the authority granted." (Emphasis supplied)

The *Nudelman* case, involving a motor carrier certificate, holds specifically that because of the Commission's authority to "specify the service to be rendered," it necessarily has the right to specify the use of certain types of vehicles. In *Miller Extension of Operations*, 21 M.C.C. 401, the Commission granted a certificate restricted to the use of tank trucks. In *Myers Common Carrier Application*, 21 M.C.C. 451, a certificate was restricted to the transportation of automobiles in driveaway service. In *Central Truck-Away System, Inc.*, 17 M.C.C. 713, the certificate was restricted to truck-away service. In *Parcel Delivery Service, Inc.*, 8 M.C.C. 275, the authority granted therein was restricted to merchandise transported in "motorcycle traffic cars, with panel bodies". In *Billy Baker Company Common Carrier Application*, 24 M.C.C. 805, the authority granted was restricted to the use of dump trucks. In *Barrows Common Carrier Application*, 19 M.C.C. 179, the authority therein granted was restricted to the transportation of not more than six passengers per trip. In *Mercer and Dunbar Common Carrier Application*, 13 M.C.C. 683,

the authority was restricted to an armored truck operation. In *Smoky Mountain Tours Company*, 27 M.C.C. 435, the applicant was precluded from using open-top equipment.

The foregoing discussion raised the question of the Commission's statutory authority to specify the service which appellant may or may not render and the type of vessels it may or may not use. It is the contention of appellant that the Commission has exceeded its statutory authority and, therefore, a reversal by this Court of the District Court's holding is required to prevent an unauthorized assumption of power by the Commission. As is well known, the Commission is a creature of Congress. It derives its authority from Congress and may exercise only such powers as are provided for in the statutes. Since the beginning of the Interstate Commerce Act, the courts have been called on numerous times to prevent the Commission from extending its control or jurisdiction over carriers in a manner not provided for by statute. This Court has on numerous occasions seen fit to set aside or invalidate an order of the Commission. For instance, in *Interstate Commerce Commission* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, the Commission contended it had the right to prescribe rates for the future. This Court held otherwise because there was no specific grant of power in the statute. In *U. S.* v. *Pennsylvania R. Co.*, 242 U. S. 208, this Court held that the Interstate Commerce Commission was given no power to order a carrier to provide and furnish its shippers tank cars for interstate shipments of petroleum products. In *Texas* v. *Eastern Texas R. Co.*, 258 U. S. 204, this Court held that the Commission was not authorized to permit abandonment of an intrastate railroad, because this authority was not plainly intended, and the Commission's action had "a wider operation and effect than can be given to it consistently with the provisions of the act" (page 218). In

Peoria & P. U. R. Co. v. *U. S.*, 263 U. S. 528, this Court held that an order of the Commission requiring one carrier to switch cars for another was invalid because there was no authority in the act granting that power to the Commission. In *U. S.* v. *Missouri P. R. Co.*, 278 U. S. 269, this Court held that the Commission was not authorized by the Interstate Commerce Act to establish all the through routes it may deem necessary or desirable in the public interest. It held:

> "It is elementary that where no ambiguity exists there is no room for construction. Inconveniences or hardships, if any, that result from following the statute as written, must be relieved by legislation. It is for Congress to determine whether the Commission should have more authority in respect of the establishment of through routes. Construction may not be substituted for legislation" (page 277, 278).

In *St. Louis O'Fallon R. Co.* v. *U. S.*, 279 U. S. 461, this Court held that the Commission must follow the mandate of Congress in fixing values and its failure to do so constitutes grounds for reversal. The Court held that "the only power to make any recapture order arose from the statute" (page 488). In *Ann Arbor R. Co.* v. *U. S.*, 281 U. S. 658, this Court held that the Commission incorrectly construed a joint resolution of Congress, authorizing the reduction of certain rates. The Commission's action therefore exceeded its statutory authority. In *Texas & P. R. Co.* v. *U. S.*, 289 U. S. 627, this Court found that the Commission had assumed a power not granted to it by Congress and "Where a statutory body has assumed a power plainly not granted, no amount of such interpretation is binding upon the courts" (page 640). This finding is certainly applicable in the case before this Court as the Commission has plainly exceeded its statutory power and has assumed authority not granted to it by the statute. Accordingly, "no amount of such interpretation"

is binding on this Court as to the Commission's power to act as it did.

In *Baltimore and O. R. Co.* v. *U. S.*, 298 U. S. 349, this Court held that an order of the Commission "if shown to rest on a misconstruction of the act" (p. 359) may be annulled. In *U. S.* v. *Idaho*, 298 U. S. 105, this Court held that an order of the Commission permitting abandonment of a "spur" line was in excess of its jurisdiction and therefore should be set aside.

This Court is urged to find as a matter of law that the Commission may not specify the service to be rendered by a water carrier in a certificate issued under part III of the act. This limitation necessarily prohibits the Commission from denying a carrier the right to operate in any manner it chooses as a common carrier. Moreover, this Court is requested to hold as a matter of law that the Commission may not specify the equipment to be used by a water carrier. Such a holding would have the effect of restoring the certificate of July 17, 1942 of appellant's predecessor.

IV

THE DISTRICT COURT ERRED IN FAILING TO FIND THAT THE COMMISSION'S ORDERS HAVE THE EFFECT OF REVOCATION OR MODIFICATION OF SECTION 314 OF THE INTERSTATE COMMERCE ACT

This case had its beginning at the time appellant filed a tariff with the Interstate Commerce Commission providing for allowances to be made to shippers if scows were furnished to appellant for use in transportation of brick. The operation of these allowance provisions is described in the Commission's report of October 18, 1951 (R. 27-28).

These allowance provisions are specifically recognized and contemplated by section 314 of part III of the act.

Section 314 of the act provides in substance that if the owner of property transported by a water carrier directly or indirectly furnishes any service connected with such transportation or furnishes any instrumentality used therein, the charge or allowance therefor shall be published in tariffs or schedules. These charges or allowances shall be no more than are just and reasonable. Section 314 of the act dealing with allowances provides that the Commission may determine the maximum reasonable charge to be paid by a carrier or carriers for the services so rendered or for the use of the instrumentality so furnished.

Under the provisions of section 314 a water carrier may make provisions for such allowances in a tariff and the Commission's only jurisdiction over these allowances is to determine whether or not the level of the allowances is just and reasonable. The question for decision under this heading, therefore, is whether or not the Commission should be allowed to in effect destroy or revoke the allowance provisions of section 314 by requiring compliance with one of its rules or orders which is in conflict with the allowance provisions of the act. In other words, if a conflict is created between a provision or section of the Interstate Commerce Act and an order or rule of the Commission, which will control or take precedence? It is the contention of appellant under these circumstances that the provision of the act must prevail over an order or regulation of the Commission, for otherwise the Commission would be at liberty to modify, suspend, change or alter any part of the Interstate Commerce Act at its will or pleasure merely by the promulgation of a rule or order.

Appellant has contended that the requirements of the Commission's order as to the circumstances under which equipment of a shipper may be used are impossible of compliance if the allowance provisions of the act are to

be recognized. In its decisions, the Commission has allowed carriers such as appellant to use the equipment of shippers so long as the carrier uses the shippers' facilities as a part of its own equipment (R. 32). It was concluded by the Commission that appellant did not use the scows of its shippers as a part of its own equipment because (1) appellant's rates provided for the return of shippers' scows light to point of origin, (2) its published rules with respect to free time and demurrage are inapplicable when scows are furnished for shippers, and (3) that appellant may not load a shipper's scow for a return movement in lieu of returning the vessel light to its owner at origin. From these facts the Commission concluded that appellant was not using shippers' scows as a part of its own equipment and, therefore, the allowance provisions of the act could not apply. The effect of this order will prohibit entirely the publication of allowances by water carriers operating under certificates such as appellant's for the reason that it is impossible for such carriers to comply with the Commission's order and still remain within recognized allowance practices. The Commission, therefore, has brought about a result which it has condemned in the past. In *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, 471, the Commission recognized that:

> "In the absence of specific language, only the most unmistakable evidence of the intention to confer upon us the power to act under general circumstances would warrant the assumption of such power (modification of a separate provision of the act) through our own construction of the act."

Allowances have been recognized for years in the field of transportation. In an early case dealing with this subject this Court held in *Interstate Commerce Commission v. Diffenbaugh*, 222 U. S. 41, 46-47, as follows:

> "The act of Congress in terms contemplates that if the carrier receives services from an owner of prop-

> erty transported, or uses instrumentalities furnished by the latter, he shall pay for them. That is taken for granted in section 15; the only restriction being that he shall pay no more than is reasonable, and the only permissive element being that the Commission may determine the maximum in case there is complaint. As the carrier is required to furnish this part of the transportation upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it."

The above case recognizes that carriers such as appellant are required to furnish equipment upon request of a shipper and that there is nothing to prevent a carrier from hiring equipment rather than owning it. That is all appellant has proposed to do under the allowance provisions of its tariff which have been condemned by the Commission.

The Commission predicated its conclusion on an earlier decision in the case of *Dixie Carriers, Inc., Rates and Allowances,* 278 I.C.C. 417. In that case the Commission acknowledged the confusion which had existed in its own decisions as to the difference, if any, between towage service and general freighting service. It was acknowledged at one time that a carrier which had authority to perform general freighting service could also perform towage service. However, at a later date in the *Campbell Transportation Co.* case, *supra,* the Commission decided that a distinction existed between towage service and general freighting service. In the *Campbell* case, the Commission held specifically that "a carrier authorized to engage in the transportation of commodities generally by non-self-propelled facilities with the use of separate towing facilities is not prohibited from using shippers' barges as a part of its equipment in performing such complete freighting service, provided the allowances for such use are reasonable and otherwise lawful". Nevertheless, the Com-

mission found in the *Dixie Carriers* case that the carrier therein could not publish equipment allowances. One of the three commissioners in that case dissented on the ground that the Commission's duty under section 314 was to determine what would be a reasonable charge as a maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished and to fix the same by appropriate order. This is the same limitation which this Court recognized in the *Diffenbaugh* case, *supra*, as the Commission's only power or authorization. Instead, however, the Commission in the *Dixie Carriers* case and in this case proceeded to decide the issue squarely on the question of whether or not the new policy announced in the *Campbell* case as previously referred to would take precedence over the provisions of the Interstate Commerce Act. The Commission's action in that regard is invalid and unlawful as it constitutes an unauthorized exercise of power not authorized by the act.

Equipment allowances in the transportation field are not matters of recent origin. Railroads have followed that practice for many, many years. These carriers have published allowances for the benefit of shippers for the use of certain types of equipment in connection with transportation. Tank cars, coal cars, fruit cars, cattle cars and other types of railroad cars have been owned by shippers but used by the railroads since almost from the beginning of the Interstate Commerce Act in 1887. Equipment allowances as a part of the transportation facility are as much a part of the scheme of transportation as is the solicitation or transportation of freight. However, the Commission in this case proposes to disrupt this long established practice and procedure for the sole purpose of protecting an earlier order where a distinction was made between towage and freighting.

The record in the case before the Commission shows that during the 1950 shipping season appellant operated under its complete supervision, control and jurisdiction, a minimum of sixteen barges and scows and a maximum of twenty-nine barges and scows. This equipment was available to appellant's shippers at all times during the 1950 season. An exhibit of record indicates that at least twenty-eight movements were made during 1950 for brick shippers with scows furnished by appellant for which no allowance was made. Appellant was ready, willing and able at all times to furnish its shippers with scows had that request or demand been made upon it. However, some of its shippers did not see fit to avail themselves of the equipment of appellant. Instead, since they already owned suitable equipment, these shippers used their own equipment under the published tariff allowances of appellant. The Commission, however, criticized appellant because of the preference of its shippers for using their own equipment rather than the equipment which appellant had available for them.

It is emphasized that the tariff provisions of appellant regarding allowances are available to all shippers without discrimination. Similarly, all shippers desiring appellant's service may require it to furnish equipment for their transportation needs. This requirement must be observed by any carrier for otherwise the carrier would be placed in a position of offering its equipment to one group or class of shippers for transportation and, at the same time, denying equipment to other shippers. This practice would certainly constitute unlawful discrimination.

It cannot be disputed that a carrier has the right to furnish transportation facilities to a shipper or to allow the shipper to furnish the facility itself if the arrangements therefor are covered by tariffs on file with the Commission and available to all alike. There is no viola-

tion of law when a shipper is given reasonable compensation out of the freight rate paid to the carrier under these circumstances. *Mitchell Coal & Coke Co.* v. *Pennsylvania R. R. Co.*, 230 U. S. 247. The only limitation is that the amount of the allowance must be reasonable. *Union Pac. R. Co.* v. *Updike Grain Co.*, 222 U. S. 215. In the *Diffenbaugh* case, *supra*, the Supreme Court held allowances to grain elevators to be proper so long as free from discrimination. In *U. S.* v. *Louisiana & P. R. Co.*, 234 U. S. 1. the Supreme Court reversed an order of Commission and held that tap-line allowances were legal. In this case, the Supreme Court held:

> "We think the Commission exceeded its authority when it condemned these roads as a mere attempt to evade the law and to secure rebates and preferences for themselves." (p. 28)

The Court recognized that the Commission's only authority in such cases would be to reduce the divisions of joint rates as would amount to rebates or discriminations so that the tap-line would receive only just compensation for what it actually did. The same principle is applicable in this case. The Commission is without authority to outlaw entirely the allowance provisions of appellant's tariff. Its only right under the statute, as was recognized by one of three commissioners in the *Dixie Carriers* case, *supra*, is to determine whether or not the allowances are just and reasonable and the maximum amount to be paid by the carrier for facilities furnished by a shipper.

The plain fact of the matter is that the Commission did not reckon with the allowance provisions of section 314 when it attempted to establish a distinction between towage and freighting in the *Campbell* case. The matter of towage is a creature of the Commission's own creation. This type of service does not exist under part I of the act applicable to railroads, or under part II of the act applicable to motor carriers. Nevertheless, under part III

of the act applicable to water carriers, the Commission would impose a new and strange regulation which is in direct conflict with section 314.

In summary, appellant urges the court to recognize that the Commission's order is predicated on its desire to enforce its distinction between freighting and towage. In so doing the Commission has effectively modified or revoked the provisions of section 314 by setting up certain standards which are impossible of compliance by a carrier and still remain within the recognized allowance practices. If the requirements of the Commission were carried out there would be no necessity of a carrier granting an allowance to a shipper simply because a carrier could lease or charter equipment and have the full right of operation and control over it to the exclusion of the shipper. This is why appellant contends that section 314 under these circumstances insofar as a water carrier operating under a certificate permitting a freighting service is concerned would have been modified or revoked. Under these circumstances and particularly in the light of the decisions of this Court that allowances are lawful, appellant should be afforded the privilege of making a reasonable allowance to shippers for furnishing a part of the transportation facility.

V

THE DISTRICT COURT ERRED IN FAILING TO HOLD THAT THE COMMISSION DID NOT OBSERVE THE PROVISIONS OF SECTION 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT

Appellant contended in the District Court that the Commission's orders complained of were invalid by reason of the fact that the provisions of section 8(b) of the Administrative Procedure Act (5 U.S.C. § 1007(b)) had not been observed. Appellant contended specifically in the District Court that the Commission had not made findings

and conclusions concerning several relevant and material issues. The District Court held that the Commission's findings were complete and adequate. Such findings, however, considered only the question of towing versus freighting, which was the only issue the Commission elected to discuss in its report. The position of appellant under this heading is not directed to the adequacy or inadequacy of the Commission's findings regarding the sole question which the Commission elected to discuss but rather the position of appellant is directed to the failure of the Commission to make findings and conclusions regarding other material issues presented on the record which in appellant's opinion were far more important than the sole issue selected by the Commission for consideration.

Section 8(b) of the Administrative Procedure Act (5 U.S.C. 1007(b)) requires an administrative agency such as the Commission to "include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof". The same section requires an administrative agency such as the Commission to include in the record "the ruling upon each such finding, conclusion, or exception presented". It is also provided that:

> "All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof".

In the pleading filed by appellant for interpretation of its status and for formal disposition of the complaint of a competing carrier, it was specifically prayed that the

Commission find that the allowance provisions contained in appellant's tariff were just and reasonable. Appellant further prayed that the Commission determine that it is, under its certificate, "legally authorized to publish and observe such (allowance) provisions in its relations with its shippers."

Subsequent to the hearing, appellant filed a brief with the Commission, exceptions to the report proposed by the examiner and a petition for reconsideration of the report of Division 4 of the Commission. Appellant has persistently advanced certain legal arguments and propositions of law in support of its position that it is legally authorized under its certificate to engage in the type of operation it is conducting on the Hudson River and to publish allowances in its tariff applicable in instances where shippers furnish a part of the transportation facility. The examiner ignored these arguments entirely in his proposed report. Division 4 listed the propositions advanced by appellant at sheet 2 of its report of October 18, 1951 (R. 22-23) and thereafter promptly proceeded to ignore or disregard those propositions of law. Other than vague inferences which have been referred to in this brief as to the Commission's reactions to these arguments, the findings of the Commission are barren of the required rulings, findings and conclusions upon material issues presented by Appellant in the case before the Commission. Otherwise stated, the Commission confined its consideration to matters of convenience to it and chose to ignore the principles of law which appellant believes are contrary to the Commission's conclusions.

From the foregoing discussion, it is readily apparent that section 8(b) of the Administrative Procedure Act requires the Commission to set forth its rulings upon all of the requested findings, conclusions or exceptions presented in the record. The Commission's statement in its report decided October 18, 1951 that "exceptions and re-

quested findings not discussed in this report nor reflected in our findings or conclusions have been considered and found not justified" (R. 23) cannot satisfy this requirement because the Court is unable to determine the basis of the Commission's decision. This type of avoidance on the part of the Commission was definitely in the mind of Representative Walter of Pennsylvania when he stated on the floor of the House of Representatives of the United States Congress on May 24, 1946,[1] as follows:

> "The second subsection of section 8 is a statutory statement of the right of the parties to submit for the full consideration of the presiding officers, first, proposed findings and conclusions, or second, exceptions to recommended decisions or other decisions being appealed or reviewed administratively and, third, supporting reasons for such findings, conclusions, or exceptions. The record must show the official ruling of the agency upon each such finding, conclusion, or exception presented. These provisions assure all parties an opportunity to present their views of the law and the facts and be heard thereon prior to the decision of any case. So that the parties and the reviewing courts may be fully apprised, all recommended of other decisions must include first, findings and conclusions, as well as the reasons or basis therefor, upon all the issues of fact, law, or discretion presented by the record and, second, the appropriate agency action or denial.
>
> The purpose and effect of these provisions are clear upon the fact of the section. One matter should be emphasized. Section 8(b) requires findings and conclusions to be stated upon all the material issues of fact which the parties may present. This means that, within the legal framework of the type of case involved, the number and the subjects of the findings and conclusions will be determined by the record and by the legal, factual, or discretionary issues raised by the parties. The mere parroting of findings or

[1] Legislative History, Administrative Procedure Act, Senate Document No. 248, 79th Congress, 2d Session, page 367.

conclusions in the words of statutes, however sufficient that may be as an ultimate conclusion, definitely would not satisfy in any manner the requirements of this section unless both the statute and the issue were very narrow indeed. Almost any case of consequence involves numerous and detailed issues of law, fact, and discretion. These must all be determined as a part of the decision. Only in that manner are the parties protected and assured that the case has been fully and completely considered and determined."

The District Court's opinion appears to be in conflict with the opinion of a Three-Judge Statutory Court in the case of *Atlanta and St. Andrew's Bay Rwy.* v. *United States*, 104 F. Supp. 193. In that case it was held specifically that section 8(b) of the Administrative Procedure Act is applicable to the Interstate Commerce Commission. In this case the District Court's decision overlooks the requirement that the Commission shall include a statement of findings and conclusions as well as the reasons or basis therefor upon all material issues of fact, law or discretion presented on the record. Under this provision the Commission has no alternative but to make these findings and conclusions, and its failure to do so conflicts with the provisions of section 8(b) of the Administrative Procedure Act.

CONCLUSION

For the above reasons, it is respectfully submitted that the decision of the Court below should be reversed, and that the order of October 18, 1951 of the Interstate Commerce Commission as affirmed by order of March 17, 1952 should be ordered vacated and set aside.

Respectfully submitted,

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March, 1953

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No. 488

In The

Supreme Court of the United States

October Term, 1952

THE CALEDONIA ROAD IMPROVEMENT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND CORNELL STEAMBOAT COMPANY,
Appellees.

On Appeal from the United States District for the Northern District of New York

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REPLY BRIEF FOR THE CALEDONIAN ROAD IMPROVEMENT COMPANY

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In The

Supreme Court of the United States

October Term, 1952

No. 488

The Callanan Road Improvement Company,
Appellant,

v.

The United States of America, Interstate Commerce Commission and Cornell Steamboat Company,
Appellees.

On Appeal from the United States District for the Northern District of New York

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REPLY BRIEF FOR THE CALLANAN ROAD IMPROVEMENT COMPANY

Now comes the Callanan Road Improvement Company, appellant in the above-entitled cause, and files its brief in reply to the brief of the United States of America and the Interstate Commerce Commission, hereinafter for convenience called the Government, and the brief of Cornell Steamboat Company, hereinafter called Cornell.

Our reply to these briefs is set forth under the following headings:

I. The District Court was misled as to the facts and the effect of the *Seatrain* case, *infra,* in construing the provisions of Section 309(a) of the Interstate Commerce Act.

II. There is no basis for inferring that Congress intended to authorize the Commission, under Section 309(d) or any other section of the Interstate Commerce Act, to specify the scope of the service to be rendered by a water carrier.

III. There was no consent, either expressed or implied, permitting the Commission to revoke appellant's predecessor's original certificate of July 17, 1942.

IV. The Commission's characterization of appellant's operation as excluding "towage" under an attempted classification of water carriers constitutes attempted revocation of appellant's certificate.

V. Commission's finding that appellant's allowance tariff under Section 314 constituted an offer of "towage" was in error.

ARGUMENT

I.

The District Court Was Misled as to the Facts and the Effect of the Seatrain Case, Infra, in Construing the Provisions of Section 309(a) of the Interstate Commerce Act

The briefs filed by the Government and by the intervening competitor, Cornell Steamboat Company, may be treated together as it is clear that they were coordinated in preparation and general content. This is illustrated by the argument *ad absurdum* relative to passenger traffic (Government's Br. 22 and Cornell's Br. 27 and 48). This similarity also applies to the discussion of *U. S.* v. *Seatrain Lines,* 329 U.S. 424, 430-431. The inaccurate char-

acterization of this part of the Supreme Court's decision as dictum appears in the Government's brief at pages 10 and 20, and is adopted in the Cornell brief at pages 48 and 49. The serious consequence of erroneous presentation on argument of crucial facts in the sequency of Commission and court decisions involved in the present case, is shown by the following references: In its brief herein, the Government says (p. 21):

> "In *Seatrain*, the Court found that the original certificate issued to the carrier was in conformity with the operations performed during the 'grandfather' period, * * *" and "unlike the situation in the *Seatrain* case, the amendment of the Hutton certificate left Hutton free to continue the operations in which he had been theretofore engaged".

In the Cornell brief (pp. 46 and 47):

> "The 'equities' are entirely different in the two cases. In the *Seatrain* case, as the lower court points out, the Commission sought by the amended certificate to curtail severely the service which the Supreme Court said that that carrier had shown itself entitled to perform under the 'grandfather' clause and under the convenience and necessity provisions as to authorization of new service. The restriction, it was pointed out, amounted almost to a limitation of the carrier to a merely car-ferry service handling railroad cars between railroads, although its service had included port-to-port traffic originating or delivered by truck or otherwise and not confined to interchange with railroads, and there was evidence of transportation of general commodities".

The District Court relying on similar argument, said as to the *Seatrain* case:

> "But, and this is important, it also carried commodities generally" (R. 66), and further (R. 69) "Plaintiff stresses the reliance of the court in the *Seatrain* case on the proviso as preventing the limitation of

facilities and service. But we agree with the Commission that this points up the difference between the two cases and affords a final ground of distinction between 'service' as there considered and defined, and scope of operations as here provided. The proviso prevents forbidding new and better equipment and facilities to carry out the operations 'within the scope of such certificates'; it does not authorize an expansion of operations beyond the grandfather's rights set out for subd. (a) of this section or the classification authorized by Section 304(c). We agree with the Commission that it cannot carry out the purpose and intent of Part III if such indefinite expansion as contemplated by the plaintiff is allowable against the Commission's finding of a public interest to the contrary".

The fact is that the Supreme Court never found that *Seatrain* carried general commodities other than in freight cars, and its decision supporting the Seatrain's certificate was not dependent on any reexamination of prior grandfather evidence. Furthermore, before this Court in the *Seatrain* case, the Commission repeated:

> "*Seatrain* never carried commodities generally, except in the sense that such commodities may have been loaded in freight cars". 91 Law ed. 396.

In the Commission's decision in *Seatrain Lines, Inc.*, 260 I.C.C. 430, 435, 437, the Commission said:

> "* * * all traffic, other than liquid cargoes in bulk, and empty railroad cars, handled by applicant (Seatrain) has been transported in railroad cars received from or delivered to rail carriers".

It is to be noted that in the present case, there has never been evidence before the Commission in the original "grandfather" case, the hearing on transfer of the certificate or in the present proceeding relating to appellant's allowance tariff that Hutton (recipient of the grandfather certificate) had not engaged in what were

later described as "towage" operations during the grandfather period. His operations were described as follows:

> "Applicant has been in operation for thirty-seven years. He owns and manages one steam power boat of about 240 horsepower, and four barges, all of which are operated as a unit. The power boat is used to tow the barges but also carries about one hundred fifty gross tons of freight. On occasion other barges are rented or chartered for operation in applicant's fleet" (R. 7).

When the Commission sought to reopen the effective and final certificate of Mr. Hutton on March 7, 1944 it confined itself solely to specification of the type of vessel saying:

> "In our prior report, we did not specify the type of vessels to be used by applicant in the exercise of the authority granted" (R. 11).

and in describing the applicant's vessels in the amended certificate the Commission authorized:

> "The continuance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally * * *" (R. 13).

In its report on the hearing on transfer of the certificate to the present appellant, the Commission authorized precisely the same certificate with the same description of equipment (except for geographical modification) and said:

> "The transferee intends to publish a tariff establishing rates for the transportation of brick, pig iron and possibly cement. It would continue to handle its own business, with the freight of other shippers intermingled in tows, but it intends, irrespective of the exigencies of its own business, to move its revenue

> freight promptly in order to satisfy shipper requirements. If the revenue traffic is sufficiently profitable, it probably will add to its equipment. Additional tugs will be available as soon as transfer of the certificate is approved" (R. 18).

The geographical limitation accepted by the transferee (appellant) in no manner modified the scope or character of service to be rendered under the grandfather certificate, although the interveners in this proceeding were concerned primarily with competition by the transferee under the Hutton certificate with their general towing operations on the New York State canals, the Commission saying:

> "That business appears to be the predecessor's primary concern in this proceeding; and its objection to the proposed transfer herein would be largely satisfied by a limitation of the superseding certificate to the river operation and to the commodities which the transferee expects to transport" (R. 19).

We have noted that the District Court was led to misconstruction of the *Seatrain* case and the assumption that the certificate of *Seatrain* was supported by this Court because it was sustained by a history of general carriage of commodities not in freight cars. From this the District Court deduced that subsequent classification or other action of the Commission might modify or limit the scope of service under a closed grandfather certificate if no such showing of grandfather operations existed. It sustained the Commission upon the misapprehension that it was thus following the Supreme Court doctrine in *Seatrain* case and preventing a competitive expansion of appellant's service. It is submitted that the *Seatrain* decision protected the plain context of the grandfather certificate and was not, and could not have been influenced by a variation in *Seatrain's* pre-grandfather and current services. The present case does not involve the determination and the scope or extent of operations of

predecessor of the appellant before grandfather date, but rather the scope of the services contemplated by the original certificate, and whether or not the Commission was justified in revoking the certificate after it is "finally granted and the time fixed for rehearing it has passed". Appellant respectfully urges that the repeated emphasis placed by appellant on reconsideration of the grandfather provisions of Section 309(a) of the Interstate Commerce Act is contrary to the statutory authority of the Commission as found in the *Seatrain* case.

II.

There Is No Basis for Inferring That Congress Intended to Authorize the Commission, Under Section 309(d) or Any Other Section of the Interstate Commerce Act, to Specify the Scope of the Service to Be Rendered by a Water Carrier.

Appellees contend that the Commission has almost unlimited authority under Section 309(d) of the Interstate Commerce Act to frame a certificate as it pleases (Government's brief 13-29; Cornell's brief 48-50). It is contended that the Commission may under Section 309(d) "define the scope of the certificate including the character of service to be provided thereunder" (Government's Br. 14). They find this authority in the phrase of the subsection adding to the requirement that the certificate shall specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate; the provision attaching to the exercise of the privilege granted "such reasonable terms, conditions and limitations as the public convenience and necessity may from time to time require, including terms, conditions and limitations as to the extension of the route or routes of the carrier, and such other terms, conditions and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part,

or those established by the Commission pursuant thereto; * * *".

They acknowledge that these terms, conditions or limitations shall not "restrict the right of the carrier to add to its equipment, facilities, *or service within the scope of such certificate*, as the development of the business and the *demands of the public* shall require * * *" or to extend its services over certain facilities incompleted at grandfather date.

The same argument was advanced in the *Seatrain* case, *supra*. In that case it was contended that under the same language the Commission could re-frame an issued certificate so as to comply with its orders, rules and regulations made thereafter "to assure appellee the substantial parity of operations in the future which it had established in the past" (*Seatrain, supra*, 424).

The Court rejected the argument and observed pointedly that although the Commission is authorized under Section 208(a) of the Act to "specify the service to be rendered" in a certificate issued to motor carriers, no such provision was included in Section 309 relating to certification of water carriers (*Seatrain, supra*, 431). This Court held in its *Seatrain* decision that "But §309, which empowers the Commission to grant certificates to water carriers, does not authorize the Commission to 'specify the service to be rendered'."

The appellees attempt to minimize the importance of this holding by an erroneous comparison of the scope of operations of Seatrain and appellant's predecessor before the grandfather date. As stated previously, the Government contends at page 21 of its brief that this Court found that the original certificate issued to Seatrain was in conformity with the operations performed during grandfather period. It is believed that the discussion under the preceding point, supported by direct references

to the Commission's decision in the *Seatrain* case and to this Court's decision, will refute those arguments. The conclusion is inescapable that if Congress had intended that the Commission should be given the right to "specify the service to be rendered" by a water carrier, that provision would have been incorporated in Section 309(d). The water carrier provisions according to this Court's decision in the *Seatrain* case, are a part of the general pattern of the Interstate Commerce Act which grants the Commission power to regulate railroads, motor carriers and water carriers:

> "The Commission is authorized to issue certificates to all three types of carriers. But it is specifically empowered to revoke only the certificates of motor carriers" (*Seatrain*, 430).

For precisely the same reason, the absence of specific authority, service to be rendered by motor carriers may be specified but service to be rendered by water carriers may not. The comparison with Part II pointed up the lack of revocation powers under Part III because in the latter part the statute *did not* specifically authorize this power. This Court's holding that the Commission is not authorized to specify the service to be rendered in a water carrier certificate was not dictum as stated in the Government's brief but was essential to the determination of the *Seatrain* case.

It is repeated that Section 208(a) of the Act, applicable to motor carriers, is practically identical with Section 309(d) applicable to water carriers, except that in the very first phrase of section 208(a) it is required that a certificate issued to a motor carrier "shall specify the service to be rendered", following which both sections require specifications of routes to be used and include the provision for the Commission's determination of reasonable terms, conditions and limitations. The omission of revocation authority in Part III of the Act was

intentional and effective and the omission of authority to specify services from Part III of the Act is intentional and effective.

Appellees argue that such a construction would permit a common carrier by water, authorized to transport general commodities, to initiate extensive passenger transportation service. The argument is fallacious. Part III contemplates a number of statutory classifications of service. For example, the terms common carrier by water and contract carrier by water are separately defined (Section 302(d) and (e)). Certain exemption provisions describe transportation by "a water carrier of commodities in bulk and liquid cargo in bulk in tank vessels" (Section 303). The "transportation of passengers" is recognized as a separate category of service subject to certain exemption provisions (Section 303(e)). With respect to water carriage performed by carriers by railroad and motor carriers, certain terminal services are listed in connection with exemption provisions. There is, however, nowhere within Part III any provision which authorizes the Commission to control and regulate the "services to be rendered" or to establish by "rules, regulations or requirements" a limitation or restriction upon operating authority determined in a grandfather certificate.

III.

There Was No Consent, Either Expressed or Implied, Permitting the Commission to Revoke Mr. Hutton's Certificate of July 17, 1942.

The appellees avoid on brief, the basic proposition that the Commission has no authority or jurisdiction to revoke a certificate of public convenience and necessity issued to a water carrier. This proposition is conclusive, and as stated heretofore, was determined in the *Seatrain* case. Nevertheless, the District Court finds that the

claimed revocation in the present case is substantially different from that in the *Seatrain* case, and that "But we are clear that in any event this can be done where the carrier has consented or waived objection. Here Hutton raised no question; obviously he was getting all he claimed or wanted. Later, on the transfer, plaintiff raised no objection; in fact, it accepted without question a superseding certificate which cut down its rights considerably, namely, on the point of territory covered" (R. 65).

Cornell relies heavily on the supposed consent of appellant to the limitation or revocation of its original certificate (Cornell's Br. 34-36). The Government, sidestepping the absence of jurisdiction for revocation, assumes that the amended certificate issued by the Commission on March 7, 1944 is the sole basis of appellant's present rights because Hutton failed to challenge the amendment (Government's Br. 29). Neither Hutton nor the appellant, his successor, ever consented to a reduction of the authority in the original grandfather certificate (otherwise than territorial), and neither consented to any specification of services which would diminish the scope of the originally authorized operation. The appellant has never agreed that the Commission has the right of complete or partial revocation of a final and effective water carrier certificate.

The Commission itself in public concession has agreed that it is without authority to revoke, amend or suspend water carrier certificates and permits. In each of its Annual Reports beginning with 1947, it has recommended to Congress the grant of such authority and each Congress has failed to adopt the proposed modification of the Interstate Commerce Act. In its current 66th Annual Report, the Commission reiterated its recommendation and as a result, on March 30, 1953, Chairman Tobey of the Senate Interstate & Foreign Commerce Committee,

by request of the Interstate Commerce Commission, introduced S. 1501 of the present Congress and a companion measure, H.R. 3792, was introduced by Chairman Wolverton of the House Interstate & Foreign Commerce Committee. Senator Tobey reported to the Senate in connection with the introduction of the Bill, that it was similar to a Bill introduced in the 82nd Congress which failed of passage. He further said:

> "'The need for the bill, which would authorize the Interstate Commerce Commission under certain conditions to revoke or amend certificates and permits of water carriers, arises because part III of the Interstate Commerce Act does not now provide revocation authority and procedure such as are found in part II and part IV with reference to motor carriers and freight forwarders, respectively. The United States Supreme Court, in United States v. Seatrain Lines, Inc. (329 U.S. 424), has indicated that the Commission is without authority to revoke water carrier certificates or permits in whole or in part, once they have become effective and the time fixed for requesting rehearing or reconsideration has passed.'"

We submit that the dignity of this Court is affected by the Commission's simultaneous persistence in revoking and amending the certificates of water carriers notwithstanding the *Seatrain* decision, and at the same time acknowledging before Congress the absence of its jurisdiction so to do.

The specific acts of the appellant and his predecessor Hutton which are said to imply consent, consist of the following: Hutton's original certificate, as finally effective after hearing in which its counsel participated, and report and order of the Commission, permitted operation "by applicant as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally * * *" between points specified (R. 9). It included no specification of equipment, it included no speci-

fication limiting the types of service and was in the broadest form possible as a common carrier of commodities. In this respect, it was even broader than the certificate in the *Seatrain* case which specified a particular type of equipment. Following the issuance of the Hutton certificate, the Commission in the *Eastern Transportation Company*, 250 I.C.C. 505, wherein applicant engaged in the movement of non-self-propelled vessels for shippers and other carriers sought a specification of "towage", held:

> "Towage on shippers' barges in the transportation of commodities generally is subject to part III, but special authority to applicant to perform such towage is not necessary because applicant will be authorized to engage in transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels. Authority to perform such transportation does not limit applicant to the use of its own non-self-propelled vessels, and the authorization should not be interpreted as forbidding the use of other barges or scows in the transportation. In order to effectuate a flexible and coordinated transportation system, carriers of this type should be able to use non-self-propelled vessels which are chartered from others, interchanged with other carriers or owned by shippers. Separate authority to tow shippers' barges is not necessary" (pp. 507-508).

We have further covered the policy of the Commission as so announced in our opening brief, pages 14-15. In the light of this decision, Hutton's certificate was completely satisfactory and covered all of the services to which he was entitled by reason of grandfather operation. Subsequently, as we have noted elsewhere, this Court decided that carriers engaged exclusively in towage and providing no transportation, were embraced within the jurisdiction of the Commission under Part III of the Interstate Commerce Act and certificates were issued limiting such carriers to towage. Finally, in the *Campbell Transportation Company*, 260 I.C.C. 107, on December

14, 1943, preceding by four days the *Foss Launch & Tug Company* case, 260 I.C.C. 103, the Commission changed its mind and granted Campbell a separate specification of authority for general towage in addition to its grant of "commodities generally". It reiterated that it did not intend to prevent the use by carriers of commodities generally of shippers' barges as a part of their equipment (p. 110). By way of dicta, it stated:

> "Carriers whose certificates or permits do not specifically authorize the performance of towage are without authority to engage in such service".

This was a Division decision. There was no industry-wide or general hearing and no order of classification was entered. The action was taken in the original grandfather case of Campbell and before its certificate became final. Nevertheless, on March 7, 1944, the Commission issued an order attempting to reopen appellant's grandfather case stating "in our prior report we did not specify the type of vessels to be used by applicant in the exercise of the authority granted". This was its sole reason for reopening. On the same day, without hearing or without further evidence as to Hutton's operation prior to grandfather date, it issued an order superseding and cancelling the certificate of July 17, 1942, and issuing an amended certificate which differed only by the addition after the words "common carrier by water" of the words "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels" (R. 13). There are no other kinds of vessels. The amendment neither limited nor changed the certificate of Hutton so far as either equipment or service was involved. There was no notice of hearing or of the intention of the order such as was issued in the Seatrain case. To the lay operator, there was no reason for objection. It was as if one said "you may use all the tables in the room and everything else which is not a table". Only subsequently, when the subtleties of regulation attributed significance to speci-

fication of equipment, could it be detected that this was intended as a revocation or limitation of the original certificate. Failure to assume that the Commission was usurping jurisdiction cannot be considered consent. In like manner, the certificate issued at the conclusion of the transfer case was identical with the original certificate except for specification of all types of equipment in the amended certificate, and for the elimination of certain territory which the transferee, the present appellant, did not insist upon serving. Nowhere in this proceeding, which was the subject of hearing and extensive argument, was it suggested that there was any limitation on the scope of appellant's operations. It did not appeal from the division to the full Commission because it had no reason so to do. This cannot be construed as consent. It is to be noted that this transfer was approved subsequent to the *Seatrain* decision in which this Court held that the Commission could not rescind or restrict originally certificated grandfather services. Must a carrier assume that the Commission will ignore the Court? The only subsequent consideration or challenge of the unrestricted operating rights of the original certificate is the present proceeding, and it is certainly apparent that appellant has not consented to any modification or restriction of its authority. In fact, it has demanded in the light of revelation of the Commission's changed intention that the amendatory order specifying equipment be rescinded, if significant, and the original certificate be reissued.

Appellees refer to the recent decision of this Court in *U. S.* v. *L. A. Tucker Lines*, 344 U.S. 33 (Government's Br. 33; Cornell's Br. 37-38) in support of their contention that appellant and his predecessor have waived the right to object to the Commission's earlier illegal act. The circumstances are not similar. In the present case, the revocation of the certificate of appellant's predecessor was illegal and unauthorized. In the *Tucker* case, the Commission had jurisdiction in the premises, the objection

being procedural in that it was alleged that an Examiner presided in an earlier phase of the case who had failed to qualify under the Administrative Procedure Act. This issue was never raised before the Commission or before final determination of the case, nor was it raised in the complaint filed with the District Court on appeal to set aside the Commission's order. On the morning of the argument before the District Court, the plaintiff in the *Tucker* case raised the question as to qualifications of the Examiner for the first time. This Court held that the objection in those circumstances concerning the qualification of the Examiner came too late.

In the present case, the action of the Commission of which complaint is made, is that it exceeded its jurisdiction. There was no statutory authority for the revocation of a certificate held by a water carrier. In the first instance in which the Commission sought to impair or limit the original certificated authority, objection was made and has been pursued to this Court. The initial action of Division 4 of the Commission herein being beyond its jurisdiction and unsatisfactory, appellant filed with the Commission on December 26, 1951 [1] a petition for reconsideration by the entire Commission in which it prayed that the original certificate of July 17, 1942 "be restored to petitioner". The Commission, after consideration, denied the petition by formal order of March 17, 1952 (R. 34). The appeal to the District Court was timely and in good order, as was the appeal to this Court. The *Tucker* case is not relevant.

[1] The petition, not printed, by stipulation may be referred to. (R. 79)

IV.

The Commission's Attempted Classification of Water Carriers Constitutes Revocation of Appellant's Certificate.

Appellees stand on the District Court's selected ground of determination. This appears at R. 65 as follows:

> "But we prefer to place decision upon the broader ground of the Commission's power to make the classification it is now so extensively employing".

The classification in question is that to which reference is made in the opinion of the District Court (R. 67) where it said:

> "* * * we think the Commission had the power to make the classification in question distinguishing between freighting and towing service, and that this was not a regulation of 'the details of service', but a 'just and reasonable classification of groups of carriers included in the term 'common carrier by water' or 'contract carrier by water' as the special nature of the services performed by such carriers shall require' which the Commission is expressly authorized to establish".

The sole provision as to classification of water carriers other than the general classification required by the statute is provided in Section 304(c) of the Act. This section which permits the establishment of just and reasonable classification of groups of carriers included in the terms "common carrier by water" or "contract carrier by water" is limited to such classification and reasonable rules and regulations pertaining thereto "as the Commission, after hearing, finds necessary or desirable in the public interest". Substantially identical language is included in Part II of the Act with respect to motor carriers under Section 204(b). Prior to attempting any such classification of motor carriers, the Interstate Commerce Commission by proper notice advised the industry

and all concerned of its proposals and submitted the matter to prolonged consideration. No such action has ever been taken with respect to water carriers. As indicated heretofore in connection with the *Eastern* and *Campbell* cases, *supra*, the Commission long subsequent to the issuance of the certificate in the present proceeding undertook in individual cases involving special facts to characterize certain types of service by common carriers as "freightage" or "towage". As of this date, there are no published rules and regulations applicable to these or any other special classifications of common carriers by water. The earliest date at which it was suggested that the term "common carrier of commodities generally" did not embrace "general towage" was December 14, 1943, in the *Campbell* decision. The description of towage is not related specifically to equipment, for in the *Campbell* case authority for both "freightage and towage by common carrier by non-self-propelled vessels with the use of separate towing vessels" is given the same carrier, and the physical function performed by common carriers using such equipment is the same. The classification, therefore, depends on the contractual arrangement and liabilities of the carrier and the type of charge made for its service. Indeed, it may depend on the ownership or control of the scows used in the service. No such classification was contemplated by the Act nor adopted with respect to water carriers.

In any event, it is clear that the Commission may not by *ex post facto* segregation of the "specification of the service to be rendered" restrict and limit a grandfather certificate issued in good faith and without fraud which, when issued, clearly contemplated all types of service. The classification argument is a mere devise to cover the assumption of authority to rescind and revoke issued and effective certificates in the furtherance of subsequent purposes of the Commission and in the interest of monopolistic classes of carriers.

The recent decision of the United States District Court for the District of Columbia, No. 2271-50, decided February 10, 1953, not yet reported, under the caption *Coastal Tank Lines, Inc.* v. *United States* is pertinent. This case was on appeal from the Commission (48 M.C.C. 289) in which the Commission construed a certificate authorizing the transportation of general commodities under the grandfather clause as inclusive of the transportation of petroleum products in bulk in tank trucks. It is important to note that the Commission in an appropriate proceeding following the issuance of the certificate, *Classification of Motor Carriers of Property*, 2 M.C.C. 703, had established a separate classification for the transportation of commodities in bulk in tank trucks. It had issued many certificates exclusively for this service under the provisions of Part II. Nevertheless, when confronted with a complaint urging that it deny to Charlton Bros. the right to conduct operations with tank trucks for the transportation of petroleum products in bulk, the Commission held that the original certificate issued prior to the classification contemplated the subsequent subdivisions.

An effort is made by the appellees to utilize this case as support for authority on the part of the Commission to establish special classifications. It has never been disputed by appellant that in connection with requests for new operations or extensions of existing operations of motor carriers the Commission may restrict the issued certificate to the service required by the public convenience and necessity. It is insisted as supported by the three-judge statutory court in the District of Columbia in the Coastal case, *supra*, that the establishment of such categories or classifications may not be used to rescind or revoke properly issued grandfather certificates. The decision of this Court in the *Seatrain* case preserving the integrity of such certificates is entirely consistent therewith.

V.

Commission's Finding That Appellant's Allowance Tariff Under Section 314 Constituted an Offer of "Towage" Was in Error.

In the welter of irrelevant argument, it is difficult to remember that this matter arose on a competitive tug operators' telegraphic complaint that appellant's tariff then in effect specifying the allowances to be made to shippers whose scows were used by the carrier in the transportation of their freight, constituted an offer of "towage" beyond the certificated powers of the appellant. The Commission agreed with this contention without any consideration of the reasonableness of the allowances under Section 314 of the Act. On brief here, the Government adopts this conclusion without valid supporting argument (Government's Brief Pages 12, 42). The Commission said:

> "From these facts the conclusion is inescapable that the petitioner does not and may not utilize shippers' scows as a part of its own equipment, from which it follows that the transportation performed by the petitioners in connection with the movement of freight in shippers' scows constitutes a towage service * * *. We conclude that the petitioner has been and is performing the service of towage without appropriate authority therefor under Section 309 of the Act, and that the rates, charges and allowances in its tariff I.C.C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful" (R. 32).

Had the Commission found that the allowances were applicable to "freightage" and thus embraced within its most recent modification of the certificate of appellant, the case would have been terminated and the complaint of the competitor rejected. It was only because it found the services performed under the allowance provision of

the tariff to be "towage", a classification defined *after* the issuance of the carrier's certificate, that it was compelled to consider its authority to modify, amend and restrict the services authorized to be performed. In like manner, if it be determined that the carrier's use of allowances, as provided in Section 314 of the Act, is within the scope of the authority in its original or amended certificates, the case must be determined for the appellant.

It should be clear that the services performed by the appellant carrier for the shipper under the existing tariff at the time of the hearing before the Commission, were precisely the same whether or not the shipper's vessel was used in the freight movement. The ports served were the same. The commodities carried, largely brick, were the same. The same tug towed the shipper's barge in the same tow with barges owned by the carrier, and with barges leased by the carrier from other owners for use in its fleet. The rates provided were quoted in cents per one thousand brick, and were the same for all shippers. Towage rates are never so quoted, but are in hours' or days' use of the tug (*Dixie Carriers, infra,* p. 418). There was no limitation on the contractual obligation of the carrier to the shipper other than those customary for a common carrier. The only respect in which the charges to a shipper providing equipment differed from a shipper who owned no equipment or who chose to use the equipment of the carrier, is the allowance made for the use of the vessel. As indicated in appellant's original brief, Government's Brief page 44, and in *Dixie Carrier, infra,* page 420, such allowances for the provision of equipment were historically authorized for more than fifty years before passage of the Water Carrier Act as a part of common carriage in the case of rail carriers; were provided for in the Motor Carrier Act, Part II, and are authorized by Section 314 in Part III of the Interstate

Commerce Act. Such allowances subject only to the test of reasonableness were expressly authorized in *Eastern Transportation Company, supra,* page 508.

If the Commission's present conclusion is correct in finding that allowances may not be made unless the carrier utilizes "shippers' scows as part of its own equipment" (R. 32), then the allowance provision is dead. Obviously, if a scow is leased for general operations in the service of all shippers for a period of time in the fleet of a common carrier, the compensation will be rental and cannot be by way of allowance against the regular freight charges of the owning shipper. It is equally obvious that in the case of "towage", the towing carrier offers no scows but merely provides motive power with its own tug and hence could make no allowances for the use of the shipper's vessels. It is clear, therefore, that allowances for use of equipment are applicable to common carriers and not applicable to towage.

When companies operating tugs only were held subject to the jurisdiction of the Commission under Part III of the Act (*Cornell Steamboat Company* v. *U. S.*, 321 U.S. 634), the Commission was compelled to issue them grandfather certificates. It limited such certificates to towage by description of equipment and of service. Under pressure of the holders of towage certificates in successive individual cases, but never by general classification after hearing it, sought to restrict other water carriers from conducting competitive strictly towage operations. This resulted in the dicta in the *Campbell Transportation Company* case, *supra,* to the effect that the authority to perform such towage is not included in the authority granted to water carriers to engage in transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels. These dicta in turn, led to the decision by a Division of the Commission in

Dixie Carriers, Inc., Rates and Allowances, 278 I.C.C. 417, where a tariff purporting to provide allowances for use of shippers' vessels was published by a carrier which did not in fact offer to carry the shippers' freight in its own or leased barges, and had only one dry cargo barge, otherwise employed. The forced criteria of the *Dixie* case, *supra*, a Division decision, in which neither the appellant nor the industry participated, were applied herein by Division 4 in reaching its conclusion that the service in the present case constituted towage (R. 30-32). The differences in essential facts were not considered by the Commission although urged by the carrier. For example: Dixie did not offer shippers suitable scows, only tugs. Appellant offered to transport commodities on its own scows or to provide scows, and did so in fact, even in the initial period of operation under the tariff, hauling twenty-eight scow loads in vessels furnished by it. Dixie operated in the Gulf of Mexico area where no physical or economic reason restricted the movement of cargo in both directions (*Dixie Carriers, Inc., supra*, 418). Appellant operated on the Hudson River where there was substantially no up-river movement of heavy commodities and both its own and shippers' scows normally returned empty. As an indication that the arrangement was towage, the Commission reported that the appellant when using vessels of shippers under the allowance provision "may not transport thereon the property of any shipper other than the one furnishing the vessel. More specifically, the petitioner may not load cargo on a shipper's scow for the return movement up the Hudson River after a shipment of brick has been discharged in New York Harbor" (R. 31). It is suggested that brick are normally shipped in full scow loads by the manufacturer, and that it is equally true that a tank car furnished a railroad by a shipper may not be used by the railroad for shipment of the freight of others on its return movement. In

towage, there are no barges used by the carrier and he cannot, therefore, use the barges of shippers for the commodities of others in either direction. Of course it can make no allowances. This practice of the appellant under the allowance provision of the tariff is completely consistent with common carriage authorized by its certificate.

The Commission suggests that published tariff rules applicable to barges owned or furnished by the carrier affecting free time for loading and unloading and demurrage when scows are held by the shipper, are inapplicable under the allowance provisions. Similar rules are likewise inapplicable under tank car allowances on railroads or any other allowance compensating for the supply of equipment by the shipper, for the sound and logical reason that the equipment belongs to the shipper, the maintenance is at the cost of the shipper, the carrier has no investment in, or right of use, of the equipment apart from the shipper's consignment of freight to the carrier, and any charge for demurrage would be grossly inapplicable and unreasonable. When the carrier's own barges are used, obviously any undue delays or retention of equipment by a shipper results in cost to the carrier, and must be compensated by demurrage.

The Commission makes much of the fact that "the shippers' scows are furnished with a captain on board who is responsible to the shipper or owner of the scow and is paid by him" (R. 28). The title of captain is by courtesy. All scows used by the carrier, whether it is owned, leased or provided by the shipper, have a caretaker or *bargee* aboard. He remains aboard to look to pumping, maintenance and fastenings, whether in tow during loading or in the off-season periods when the river is frozen. He does not control the arrival, departure or

movement of the vessel, and there is no evidence anywhere in this record that he conducts a transportation operation. His function and the liabilities of the carrier under common carriage and under towage, are distinguished in *William Stevens* v. *The Vessel White City*, 285 U.S. 195, 202, wherein Justice Butler stated that the respondent tug engaging in *towage* was not an insurer or liable as a common carrier but that its obligation for loss was upon proof of negligence in tort rather than contract. The fact that he is paid by the owner of the vessel is no more significant than the fact that cattle handlers on cattle cars are paid by the stock owner on a railroad. The appellant herein, contracting to move brick at a rate per thousand, has full obligations for the cargo as a common carrier unaffected by the allowances for the use of the shipper's vessel.

The District Court did not consider these important factors. It accepted the Commission's definition of the service as "towage" and said, "the Commission was not overstepping its powers under this section to pass upon the reasonableness of the allowances; it never got to that question in making its decision that the entire operation was illegal" (R. 70).

It is interesting to note that the District Court, having completely ignored and failed to pass upon the earnestly advocated contention of the appellant that the service performed under allowances was not towage, dismissed the appellant's contention that the Commission had violated the Administrative Procedure Act by similar failure to consider the arguments and evidence as "this objection seems to border on the frivolous, particularly as it is entirely general, without any indication how the plaintiff has been harmed or about what it is left in doubt" (R. 70, 71). Since proper disposition of this question would have eliminated the characterization of the operation as towage and made it entirely unnecessary to construe appellant's

certificate, it is obvious that the question is not frivolous and that the trial court was misled as to critical facts.

Examination of the Cornell Brief, Page 13, *et seq.*, is suggestive of the kind of argument the trial court encountered. Apart from the conclusion that the Commission speaks *ex cathedra* in matters of interpretation of its own decisions, intervener relies on flat misconstruction of the facts of record and innuendo to support a suggestion that the service appellant performs under the protested tariff is different than that for which it was certificated. Verification of the facts cited above, which are of record, permit only the conclusion that the allowance service is not "towage", and in any event, is contemplated by "common carriage of commodities generally".

CONCLUSION

The Court should conclude:

1. That the District Court was misled as to the facts and import of the *Seatrain* case and did not consider the essential issues.

2. That the Commission admittedly is still seeking from Congress the right to revoke or amend certificates issued water carriers under Part III of the Interstate Commerce Act and does not presently have these statutory powers.

3. That the Commission may not so specify or classify services rendered by common carriers by water of commodities generally so as to limit the scope of the operations plainly provided by final certificates of convenience and necessity.

4. That the allowances to shippers for the use of their equipment made herein are in fact an evidence of "freightage" operations and, if reasonable, are provided for in Section 314 of the Interstate Commerce Act.

5. That appellant cannot be deprived lawfully of its operating rights under the original certificate of its predecessor and may continue to conduct its operations under its presently published tariff.

Respectfully submitted,

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April, 1953

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No. 483

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE CALLINAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK, APPELLANT

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND CORNELL STEAMBOAT COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

MOTION TO AFFIRM

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

CIVIL ACTION No. 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY, A PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS.

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees United States of America and Interstate Commerce Commission move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment entered on September 15, 1952, by a specially-constituted three-judge district court convened pursuant to 28 U.S.C. 1253, 2284, and 2325, dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission. Appeal was allowed on November 7, 1952, and the appeal papers were served on November 10, 1952.

The order of the Commission which is attacked in this proceeding required appellant to cancel certain rates, charges and allowances to the extent

that they cover towage service, upon the ground that such rates, etc., were published without authority and hence are unlawful since the certificate of public convenience and necessity held by appellant does not permit it to render towage service. There is no dispute over the underlying facts, which are set forth fully both in the report of the Commission (*Joseph R. Hutton Contract Carrier Application*, 285 I.C.C. 75) and in the district court's opinion (107 F. Supp. 184).

Appellant's certificate of operating authority is derived from a certificate issued to one Joseph R. Hutton. Following the enactment in 1940 of Part III of the Interstate Commerce Act providing for regulation of water carriers, Hutton applied for a certificate of public convenience and necessity based upon the "grandfather" provisions of Section 309(a) of the Act, 49 U.S.C. 909(a), and in July 1942 the Commission granted him a certificate (250 I.C.C. 804). The Commission found that on the critical date, January 1, 1940, Hutton was operating as a common carrier by water in the transportation of commodities generally between points in New York Harbor and Hudson River points; and that he used for these operations a steam-power boat and four barges, all operated as a unit (285 I.C.C. 75, 76).

Subsequently the Commission on its own motion reopened Hutton's application and in March 1944 issued an amended certificate which superseded and cancelled Hutton's prior certificate (260 I.C.C. 804). The Commission's report stated that the reason for this action was to define Hutton's operating rights so that he would not be free to

"perform services different from those performed by him on and since the statutory date" (107 F. Supp. 184, 186). The district court observed that "Hutton accepted the new certificate apparently without any question and certainly without any formal objection, either within the time permitted or otherwise" (*ibid.*).

The change in Hutton's certificate was designed to confine him to the service of "freighting" which he had performed on and after the statutory period, i. e., transporting goods by means of towed barges or scows, as distinguished from "towage," i.e., towing barges or scows furnished by a shipper and loaded with his goods and returning the scows empty to point of origin. Under the Commission's rulings, this "is a distinct type of service or field of operation," and, since many carriers performed during the "grandfather period" either only freighting or only towage, to ignore the distinction between them would permit carriers which had engaged in only one type of service "to invade the field of" carriers which engaged in only the other type. *Campbell Transportation Company Common Carrier Application*, 260 I.C.C. 107, 109-110; *Dixie Carriers, Inc., Rates and Allowances*, 287 I.C.C. 417, 421-424.

Following Hutton's death in 1945, his operating rights were sold to appellant. In August 1947 the Commission approved this transfer (265 I.C.C. 813), cancelled Hutton's operating certificate, and issued a certificate granting to appellant the same operating rights held by Hutton except to exclude right to operate between certain points in upper New York (285 I.C.C. 75, 77). The Commission's

report noted that appellant had consented to this limitation in the area of its operations, and said that any certificate may be modified "with the holder's consent" (*id.*, 78).

In 1949 appellant filed with the Commission a tariff effective April 17, 1949, naming rates for transporting bricks from various Hudson River points to points in New York Harbor, with a substantial allowance to the shipper if he furnished the scow in which the bricks were loaded and a further allowance if appellant was not required to return the empty scow to point of origin (285 I.C.C. 75, 80). The Cornell Steamboat Company, which has a certificate of public convenience and necessity authorizing it to perform towage service as a common carrier between points in New York Harbor and Hudson River points (see *Cornell Steamboat Co. v. United States*, 321 U.S. 634), complained to the Commission that certain provisions in appellant's tariff contemplated mere towage service not authorized by its certificate (*id.*, 79). After the Commission had informed appellant that its tariff appeared to provide for furnishing towage service, which its certificate did not authorize, appellant filed a petition for determination of its operating rights (*ibid.*).[1] The Commission ruled that appel-

[1] Appellant at the same time filed an application to purchase the Hudson River towage rights of another company and an application under Section 309(c) of the Act for a certificate of public convenience and necessity authorizing it to perform general towage service on the Hudson River. These applications were pending at the time the Commission ruled in the present proceeding. (285 I.C.C. 75, 79-80.)

lant was performing the service of towage not authorized by its certificate and accordingly cancelled the provisions of its tariff to the extent that they covered such service (*id.*, 82). On appellant's suit to set aside the Commission's order, a three-judge district court unanimously upheld the order in an opinion written by Circuit Judge Charles E. Clark.

We submit that in this case the Commission clearly did not partially modify or revoke appellant's certificate of operating authority. All that the contested order does is to bar performance of a kind of service not authorized by appellant's certificate. The certificate, which was issued in 1947, does not specifically authorize service of towage, and the Commission had ruled as early as December 1943 in the *Campbell* case, supra: "Carriers whose certificate or permits do not specifically authorize the performance of towage are without authority to engage in such service." 260 I.C.C. 107, 110. The Commission's order and the present appeal therefore do not raise the first question presented in appellant's jurisdictional statement, namely, whether the Commission has authority under Part III of the Interstate Commerce Act to effect a partial modification or revocation of a certificate issued to a water carrier.

The third question presented in the jurisdictional statement is whether the Interstate Commerce Commission may alter or partially revoke a certificate issued to a water carrier if the changed certificate is accepted by the holder without objection.

Appellant contends that a change in the certificate, even though the holder has not objected thereto, is contrary to the basis of decision in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424. But we submit that this decision has no application here. In the first place, appellant's operating rights are those conferred by the certificate issued to it, and the Commission, by its order in this case, has made no change in these rights. In the second place, even if appellant's operating rights were to be deemed measured by those which its predecessor in interest may have held at one time, the change made in the Hutton certificate in 1945 is not governed by the *Seatrain* decision, first, because, unlike the situation in *Seatrain*, the change merely confined operating authority to the kind of service in which the carrier had been engaged during the "grandfather" period and, second, because the change in certificate was accepted without objection or protest and was acquiesced in by appellant and its predecessor in interest for some six years—1943 to 1949.

The second question presented by the appeal is whether the statute empowers the Commission to specify in certificates issued under Section 309(a) of the Act the type of service which the carrier may render. Appellant relies in this connection upon doubts expressed in the *Seatrain* case as to whether Part III of the Act authorizes the Commission to issue certificates which "regulate the details of the service of water carriers." 329 U.S. at 431-432.

Section 309(a) provides that if a carrier was in bona fide operation as a common carrier by water on January 1, 1940, over the routes with respect to which application is made and has so operated since that time (or if engaged in furnishing seasonal service only was in bona fide operation during the seasonal period "for operations of the character in question"), the Commission shall issue a certificate without requiring proof that public convenience and necessity will be served by "such operation."

Obviously carriers by water do not all perform the same type of service. Some carry only passengers and their baggage, some only freight, some only a particular commodity (see *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236), some (like appellant prior to 1949) only freighting by means of towed vessels, and some (like Cornell Steamboat Co.) only towage. Neither the language nor the purpose of Section 309(a) warrants construing it as meaning that a company which engages in only one type of service on and after the statutory date is entitled to a certificate authorizing any and all types of service. In the *Cornell Steamboat* case, which involved a certificate authorizing a particular type of service, this Court said (321 U.S. at 637) that the Act is designed to "provide for regulation of the rates and services of *competing* interstate water carriers as part of a broad plan of regulation for all types of *competing* interstate transportation facilities". [Italics supplied.] The Court, after noting that Cornell was in active

competition with "other types of interstate water carriers," said (*ibid.*):

> Therefore, if Cornell's *particular method of providing water transportation facilities* for others is not subject to regulation under the Act, it would appear to present an anomalous exception to the Congressional plan for regulation of *competing* transportation activities. [Italics supplied.]

Differentiation between water carriers on the basis of the character of the services which they perform is expressly authorized by the Act. Section 304(c), 49 U.S.C. 904(c) provides:

> The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms "common carriers by water", or "contract carrier by water", *as the special nature of the services performed by such carriers shall* require; * * *.

The Commission in *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, 78, aptly stated the reasons why a certificate based on grandfather rights should grant operating authority for only the type of service in which the carrier had been previously engaged. The Commission said:

> Applicant furnishes transportation by barge, and we will limit his service to that type

of operation. Classification of carriers in terms of their type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights of water carriers subject to part III of the act.

In the *Campbell, Dixie,* and *Mechling* cases, as well as in other cases, the Commission has recognized the need to classify carriers according to the nature of the services which they rendered in the grandfather period, and to issue certificates authorizing only the type of service so performed, in order to effectuate the Congressional purpose to preserve grandfather rights without permitting expansion of operations into new fields, which would upset the competitive balance existing in 1940 and would effectively nullify the provisions of Section 309(c) that the Commission may grant new operating authority only if it finds that this is required by public convenience and necessity. See *Erie & St. Lawrence Corporation Contract Carrier Application,* 260 I.C.C. 235, 237-238, upholding the decision of Division 4 (250 I.C.C. 767, 780).[2]

[2] If operations on the statutory date so require, a Section 309(a) certificate may authorize a carrier to perform one type

The question in the instant case, whether the Commission may issue a certificate of operating authority limited to the type of service performed during the grandfather period, lies outside the matter given consideration in the *Seatrain* case, whether the Commission may regulate "the details of the service" in a certificate issued to a water carrier.

Appellant's two final contentions are that the Commission failed to comply with Section 8(b) of the Administrative Procedure Act, and that its order is in conflict with Section 314 of the Interstate Commerce Act. The former contention, as the district court observed, "seems to border on the frivolous" (107 F. Supp. 184, 191). The contention based on Section 314 is likewise clearly without merit. The Commission ruled that under the allowances made to shippers in appellant's tariff, it was performing a service of towage which its certificate did not authorize. The Commission's power to prohibit this unauthorized transportation is not affected by the fact that, under Section 314, a carrier engaged in rendering authorized transportation service, may make an allowance to the shipper if he uses in such transportation an instrumentality furnished by the shipper.

For the foregoing reasons, we submit that this appeal presents no substantial question. It is

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of service on particular routes and other types of service on other routes. *Warner* v. *United States*, 97 F. Supp. 580, 582 (W.D. Tenn.), affirmed per curiam 341 U.S. 907.

therefore respectfully submitted that the judgment of the district court should be affirmed.

ROBERT L. STERN,
Acting Solicitor General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

November 1952.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
A CORPORATION, SOUTH BETHLEHEM, NEW YORK,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION AND CORNELL STEAMBOAT COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

MOTION OF CORNELL STEAMBOAT COMPANY TO AFFIRM

CURRY AND DOLAN,
R. GRANVILLE CURRY,
FREDERICK M. DOLAN,
THACHER, PROFFITT, PRIZER AND CRAWLEY,
PAUL L. CLUGSTON,
REILLY AND REILLY,
DESMOND F. REILLY,
Counsel for Cornell Steamboat Company.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Civil Action No. 4273

THE CALLANAN ROAD IMPROVEMENT COMPANY,
Plaintiff-Appellant,

vs.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,
Defendants-Appellees

MOTION BY CORNELL STEAMBOAT COMPANY, INTERVENING-DEFENDANT, TO AFFIRM

Cornell Steamboat Company, intervening defendant, respectfully moves that, pursuant to Rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, the decree of the District Court, entered on September 15, 1952, be affirmed.

This is a direct appeal from the final decree, entered September 15, 1952, by the District Court, specially constituted of three Judges. The decree dismisses the appellant's complaint to set aside an order of Division 4 of the Interstate Commerce Commission, dated October 18, 1951, as affirmed by an order of the entire Commission on reconsideration, dated March 17, 1952. The order thus com-

plained of, with the report made a part thereof (285 I.C.C. 75), found that appellant herein "has been and is performing the service of towage without appropriate authority therefor under section 309 [of the Interstate Commerce] act", that its tariff providing for allowances to shippers is in respect to unauthorized towage, that such allowances "are published without authority, and therefore are unlawful"; and that plaintiff is required to cancel the "rates, charges, and allowances described", in this report (285 I.C.C. 75) and therein found to be unlawful (Ex. No. 4 to the complaint.

An appeal from the final decree above mentioned was allowed on November 7, 1952, and the appeal papers were served on this defendant-appellee on November 10, 1952.

The District Court in its opinion accompanying the above-mentioned final decree states (p. 7) that the report of the Commission (285 I.C.C. 75) "has a complete statement of facts, to which we make reference and which we accept as our own"; that "As a matter of fact there is substantially no conflict as to the basic facts"; and that "the issue arises as to the law applicable.". Basically, as the Court points out (p. 2) appellant, holding a certificate of public convenience and necessity for "freighting" is endeavoring to extend this to include "towing" on grounds which the Commission and the Court find to be clearly without merit.

Vital Concern of Cornell Steamboat Company, Appellee

Cornell has been engaged in the business of towage on the Hudson River for a period of 115 years. Following enactment of the water-carrier provisions of the Interstate Commerce Act, it applied to the Commission for, and was granted, a certificate authorizing "towage" on this river. On the other hand, the Callanan Road Improvement Company, appellant, a concern engaged in the production of

stone and other products, did not become a carrier until after the transfer to it, pursuant to authority of the Commission granted on August 18, 1947, of operating rights to perform transportation on the Hudson River by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, a service generally known as "freighting." The certificate issued to Callanan contains no reference to towage or towage rights. Callanan apparently recognizing that its certificate did not permit "towage" as distinguished from "freighting" filed a tariff providing for allowances to shippers in connection with barges furnished by them. By this device appellant sought to conduct in reality towage services for shippers furnishing their barges under the allowance provisions of its tariff and succeeded in diverting traffic from Cornell to its great injury. Appellant, although in reality having no towage rights, and although having acquired its "freighting" rights for only $2,750 was thus able to divert from Cornell, a carrier limited to towage, traffic amounting in one year alone to a loss in revenue of over $250,000 (R. 141, 142).[1]

The Proceeding Before the Commission

The order of the Commission here under consideration resulted from complaint made by Cornell of alleged unlawful towage by Callanan pursuant to the allowance provisions in its tariff and from a petition by Callanan for interpretation of its certificate. A hearing was held before

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[1] The District Court in concluding, as did the Commission, that the service performed by Callanan under the allowance device above mentioned was and is actually towage, not authorized by its certificate, stated, p. 9:

> "In fact it is because of this operation [by Callaman] and rates and allowances it has made upon receiving shippers' scows laden with New York bound commodities that plaintiff has been able to undercut Cornell, causing—on its initial purchase of $2,750—a loss to Cornell asserted by the latter to have reached $250,000 of revenue in a single year".

the Commission, at which Callanan was opposed by several carriers but the "brunt" of the opposition, as stated by the Court (p. 2), was borne by Cornell.

As late as the hearing in that proceeding, Callanan admitted, by counsel, that the rights transferred to it did not include the right to perform towage and that the type of service performed by it under the allowance provisions of its tariff was not towage but freighting (R. 9, 10). Nevertheless, later, as an exigent afterthought,[2] Callanan contended that its certificate, although consented to, could not be interpreted to exclude towing, that such interpretation would constitute an unauthorized revocation in part of its certificate, and that in any event the Commission had no power under the statute to specify services and limit Callanan's operations to exclude towage. Callanan also contended that its allowance practice was not towage but freighting and thus permitted under its certificate. Such contentions, overruled by the Commission and the District Court, are again made on appeal.[3]

(1) *Contention of appellant as to indirect revocation of its certificate by the report and order here in issue.* In substance appellant's claim is that its certificate in authorizing operation by non-self-propelled vessels with the use of separate towing vessels does not exclude "towage" as distinguished from "freighting", and that the report and order of the Commission here in question, in finding that towage is not included, effects a partial revocation of the certificate.

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[2] The District Court said, page 9, "Plaintiff's present attempt to expand its grant is an obvious afterthought stimulated by the exigencies of its competition with Cornell".

[3] A further contention is made by appellant as to alleged failure to comply fully with the Administrative Procedure Act. The District Court holds that this contention borders on the "frivolous" (p. 17). It is so clearly bereft of merit that it is not dealt with here.

This contention runs counter to the long line of cases decided by the Commission holding that certificates providing for such use of equipment as that set forth in the Callanan certificate is "freighting" and does not include "towage". Moreover, Callanan's actual knowledge and recognition of the fact that its certificate permits only freighting and not towage was clearly admitted at the hearing before the Commission (R. 9, 10), referred to above. The resort by Callanan to the allowance device as an attempt to give the semblance of freighting services to operations actually amounting to towage is a further admission of the knowledge by Callanan that its certificate did not authorize towing. Otherwise it would have directly offered to perform towage services.

Callanan argues that its contention "is critically important to all water carriers" (Statement as to jurisdiction, p. 7). The fact is that no water carrier, either before the Commission or the District Court, has supported Callanan in this contention or its other contentions. Such carriers recognize the soundness and justness of the long line of decisions of the Commission distinguishing between freighting and towage and holding that freighting certificates do not include towage.

The distinction between freighting and towage is designed to preserve the inherent advantages of such services as contemplated by the Interstate Commerce Act and the National Transportation Policy, to maintain parity between future service and past bona fide operation in cases under the "grandfather" provisions of the Act, and to maintain "the competitive balance of types of carriers over the same route" without disruption by unauthorized services. *Erie & St. Lawrence Corp. Contract Carrier Application*, 260 I.C.C. 235, 238; *Norfolk, Baltimore and Carolina Line, Inc., Ext.—James R.*, 265 I.C.C. 247, 253, 254, af-

firmed as to this matter, by the entire Commission, 265 I.C.C. 313, and *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, 78.

Appellant's predecessor in interest was Joseph R. Hutton who, as the District Court states (p. 3), "owned and managed," during "the crucial grandfather period prior to January 1, 1940", "one steam-power boat of about 240 horsepower, and four barges, all of which were operated as a unit." Hutton was not engaged in towage services during the "grandfather" period, and was not entitled to a certificate authorizing such operation.

The original decision of the Commission holding that Hutton was entitled to "grandfather" rights did not specify the equipment which might be used in performing the service authorized (*Hutton Contract Carrier Application* 250, I.C.C. 804, July 17, 1942). The certificate issued was subject to such terms and conditions as might later be attached by the Commission to the exercise of the authority granted.

In the meantime, as the District Court also pointed out (p. 4), the Commission had occasion to state the distinction between freightage and towage, such distinction going "back to well-known differences in admiralty shown by the difference in liability of a towboat and of a common carrier of freight." *Stevens* v. *The White City*, 285 U. S. 195, 200. In *Campbell Transportation Co. Common Carrier Application*, 260 I.C.C. 107, December 14, 1943, the Commission as in other cases emphasized that "Towage is a distinct type of service or field of operation". It said, "Carriers whose certificates or permits do not specifically authorize the performance of towage are without authority to engage in such service".

Later, on March 4, 1944, the Commission ordered the Hutton application opened for reconsideration and filed a report and amended certificate specifying freighting,

namely, operation by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels. It thus provided for the very type of service which Hutton had performed during the "grandfather" period and as to which it was actually entitled to a certificate. Authority to perform towage was not provided for in the certificate and was properly excluded.

Although ample time was provided for objection or review of its decision before its effective date, Hutton made no effort to object or contest such decision and the amended certificate made pursuant thereto. This was natural because the certificate gave him exactly what he was entitled to receive under the "grandfather" provisions of the Act, namely, the right to perform freighting.

Thereafter, on August 18, 1947, in *Joseph R. Hutton Certificate Transfer,* 265 I.C.C. 813, the Commission authorized Callanan to acquire the certificate which had been granted to Hutton, the transfer being made by Hutton's administratrix for a consideration of $2,750. In that case Callanan not only did not object to the specification of the equipment in the Hutton certification and the limitation to freighting, but in answer to a contention by a water carrier association that the certificate should exclude "self-propelled vessels" urged "that the certificate may not be attacked collaterally in this proceeding" and "that when a certificate is finally granted, and the time for rehearing has expired, a certificate is not subject to revocation in whole or in part" (Ex. No. 3 to complaint).

Following the Commission's order in the *Transfer Case, supra,* it issued to Callanan an amended certificate, dated February 5, 1948, which by its terms was not to become effective until March 19, 1948, over thirty days later. The certificate contained the same provision as to use of equipment as in the Hutton certificate which was authorized to

be transferred. No objection was made by Callanan, within the period prescribed, to the certificate which was thus issued to it and which was in fact its original and only certificate.

These facts unmistakably show that Callanan knew that it was restricted to freighting as distinguished from towing, and that it and its predecessor in interest, Hutton, made no objection to, and in fact, consented to, such restriction in the certificate. The order here under attack does not in any way change or modify Callanan's certificate. It merely recognizes, as its long course of action showed and Callanan itself admitted, that the certificate permits freighting only and not towage.

Appellant heavily relies upon *United States* v. *Seatrain Lines*, 329 U. S. 424 (1947) as authority for the contention that the Commission cannot revoke in whole or in part a certificate after it is once issued to a water carrier. The District Court in the present case, and the Commission as well, have shown that the *Seatrain* case has no application here because the certificate in that case was duly protested while the certificate in the present case was clearly consented to. Moreover, as the District Court points out the equities in the two cases are clearly different.[4] In the *Seatrain* case the change in the certificate was not only objected to by the carrier there involved but such change clearly narrowed and restricted rights to which that carrier had shown it was entitled. In the present case Callanan and its

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[4] The District Court said, page 12, "Certain differences in the legal situation and the equities are at once obvious". In the *Seatrain* case, "Seatrain fought throughout to preserve rights it had definitely exercised" which the Commission "had recognized with finality" and which it sought later "to take * * * away". In the present case in contrast "the early reopening was to clarify the grandfather rights sought and granted, and the correction was accepted". What is dealt with "is a later attempt [by appellant] to expand those rights beyond anything covered or contemplated by the grandfather privilege".

predecessors are limited in the certificate issued by the Commission to exactly the operating rights to which they are entitled under the "grandfather" clause, namely the rights to perform freighting and not towing, and such limitation was consented to. The contention as to revocation is without substance.

(2) *Contention by appellant as to alleged absence of power in the Commission to specify the type of service to be rendered.* Both the District Court and the Commission show that under the provisions of Section 304(c) of the Act and Section 309, the Commission has ample authority to classify carriers in terms of their type of operation because this "assures the public that the same type of service will be continued by them" and that "the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity". *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77; *Erie & St. Lawrence Corp. Contract Carrier Application*, 260 I.C.C. 235, 238, and *Norfolk, Baltimore and Carolina Line, Inc., Ext.—James R.*, 265 I.C.C. 247, 253, 254, affirmed on this point by the entire Commission, 265 I.C.C. 313.

In numerous cases, as the District Court points out (p. 13), the Commission has acted to grant both freighting and towing rights by careful and specific mention of each or by specific grant of operation in the performance of towing alone.[5]

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[5] *Tidewater Transp. Co., Common Carrier Application*, 260 I.C.C. 30, affirmed in *Inland Navigation Co. v. United States*, 76 F. Supp. 567 (1948), *James McWilliams Blue Line Inc., Com. Car. Application*, 260 I.C.C. 15; *Upper Mississippi Towing Corp. Com. Car. Applications*, 260 I.C.C. 85; and *Southern Transp. Co. Contract Carrier Application*, 260 I.C.C. 129. Other decisions by the Commission (not printed in full) which were made prior to the March 7, 1944, amended certificate above

The *Seatrain* case, *supra*, relied upon by appellant, is no authority for a contrary view. Later decisions by the Supreme Court, although not discussing this specific point, have upheld certificates specifying the equipment to be used and the service to be performed, including "freighting". *Warner* v. *United States*, 341 U. S. 907, affirming on motion, D.C. W.D. Tenn., 97 F. Supp. 580 (referring to specification of freighting on p. 582), which sustained 265 I.C.C. 543; *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U. S. 236, sustaining the certificate in 260 I.C.C. 175, specifying operation by "self-propelled vessels".

The proviso of Section 309(d), as the District Court makes plain, does not prevent the limitation of facilities and service in appellant's certificate. The intent of the "grandfather" clause would be "set at naught" if appellant's contention were sustained and the effect would be not to preserve, but unjustly to enlarge, "the position which the carrier had obtained in the nation's transportation system". *Noble* v. *United States*, 319 U. S. 88, and *Crescent Express Lines* v. *United States*, 320 U. S. 401.

(3) *Contention as to alleged revocation of the Hutton certificate of July 17, 1942.* This contention has been dealt

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mentioned and which provided for both "freighting", namely by non-self-propelled vessels with the use of separate towing vessels, and towage because, unlike the present case, the "grandfather" operation included both are the following: *Inland Waterways Corporation Common Carrier Application*, 260 I.C.C. 808; *Arrow Tug & Barge Co. Contract Carrier Application*, 260 I.C.C. 808; *Diesel Towing Co. Contract Carrier Application*, 260 I.C.C. 809; *Ohio River Company Contract Carrier Application*, 260 I.C.C. 810; *Harbor Towing Company Contract Carrier Application*, 260 I.C.C. 810; *Westport Towboat Company Contract Carrier Application*, 260 I.C.C. 812; *Blaske Lines Contract Carrier Application*, 260 I.C.C. 813; *Washington Tug & Barge Co. Applications*, 260 I.C.C. 814; *American Tug Boat Co. Application*, 260 I.C.C. 814; *Pioneer Towing Co. Applications*, 260 I.C.C. 814; *Olympia Towing Co. Applications*, 260 I.C.C. 814; *Olson Tug Boat Co. Applications*, 260 I.C.C. 814; *Tacoma Tug & Barge Co. Applications*, 260 I.C.C. 815; *Portland Tug & Barge Co. Contract Carrier Application*, 260 I.C.C. 817; and *Grizzaffi Motor Company Applications*, 260 I.C.C. 819.

with above in respect to contentions 1 and 2. Not only did Hutton, appellant's predecessor in interest, consent to the amended certificate of March 7, 1944, under which ample time was provided for objection before it became effective, but appellant consented to the transfer of this amended certificate to it by the order of August 18, 1947, without objection, and further consented to the amended certificate issued to it pursuant to order of February 5, 1948, although having ample time within which to object to that certificate. There was, of course, no objection because the freighting rights provided for were those which had been justified under the "grandfather" clause and there had been no ground shown for towing rights.

As an additional reason for rejecting appellant's contention, the certificate issued to appellant following the approval of the transfer above mentioned is the original and only certificate received by this carrier, and prior thereto the Commission could have provided for the restriction as to equipment and service set forth therein, even if contrary to fact, the amended certificate of March 7, 1944, to Hutton had been invalid. See *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419 (1951).

(4) *The contention of appellant as to alleged revocation of the allowance provisions of the Interstate Commerce Commission Act.* As the District Court and the Commission concluded, allowances cannot properly be paid by a carrier in respect to services which it is not authorized to perform. Here appellant is not authorized to perform towage and the payment of allowances in respect to such service is, therefore, unlawful, and is properly forbidden by the Commission in the order here in issue.

The District Court aptly summarizes the undisputed evidence before the Commission showing appellant's actual performance of towage, as distinguished from freighting,

and thus the unlawful character of the allowance practice in question (p. 8):

> "The provision for return of shippers' scows light to points of origin, the inapplicability of plaintiff's ordinary rules for free time and demurrage when scows are furnished by shippers, the charge made for the return of the empty scow (or allowance in the tariff when it is not returned), the concession that plaintiff may not itself load such a scow at New York for an upstream movement in lieu of returning the vessel light to its owner at origin, the control of the scows by the shippers' own captains—all support the finding (and permit of no other) that shippers' scows are received by plaintiff as part of a consignment to be towed and are not used as a part of its equipment."

The Commission's findings to the same effect are set forth in its report (285 I.C.C. 75, 80-82). Clearly appellant's service under the allowance provisions is towage, which is not permitted by its certificate, and is not freighting which is authorized therein. The Commission's conclusions, and those of the District Court, are firmly supported by such decisions as *Dixie Carriers, Inc., Rates and Allowances,* 278 I.C.C. 417; *Union Barge Line Applications,* 260 I.C.C. 563; and *Campbell Trans. Co., Common Carrier Application,* 260 I.C.C. 107, 110. Appellant clearly does not have control of shippers' barges by lease, charter, or other arrangement withdrawing them from the category of towing. Appellants' contention that equipment "leased" from a shipper, though a part of the carrier's facilities in freighting service, would not be under the allowance provisions of the Act misconceives those provisions. See, for example, *Payment For Leased Motor Vehicles on Cotton,* 276 I.C.C. 675 (a case involving allowances for lease of motor vehicles).

Moreover, the factual determination by the Commission involved the exercise of the discretion conferred upon it,

and even if there were doubt, as it is believed there is not, such exercise of discretion would be final and conclusive in the absence, as here, of abuse of discretion or departure from statutory standards.

As above indicated, appellant's contention with respect to the Administrative Procedure Act was found by the District Court to "border on the frivolous" and to be without substance. It deserves no discussion here.

Appellant's contentions are thoroughly and devastatingly found by the District Court to be without merit. This was the conclusion of the hearing examiner, of Division 4, and of the entire Commission upon reconsideration. Appellant's contentions are clearly insubstantial, inequitable, and completely lacking in merit.

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

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November 19, 1952.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
A Corporation, South Bethlehem, New York,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CORNELL STEAMBOAT COMPANY.

Appeal From The United States District Court for The Northern District of New York.

BRIEF ON BEHALF OF CORNELL STEAMBOAT COMPANY, APPELLEE.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Supreme Court of the United States

OCTOBER TERM, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
A Corporation, South Bethlehem, New York,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CORNELL STEAMBOAT COMPANY.

Appeal From The United States District Court for The Northern District of New York.

BRIEF ON BEHALF OF CORNELL STEAMBOAT COMPANY, APPELLEE.

OPINION BELOW

The opinion of the District Court (R. 59) is reported in 107 F. Supp. 184 (September 15, 1952). It upholds the decision of Division 4 of the Interstate Commerce Commission (R. 22) of October 18, 1951 (285 I. C. C. 75), affirmed on petition for reconsideration by the entire Commission on March 17, 1952 (R. 1).

JURISDICTION

The final judgment of the District Court was entered on September 15, 1952 (R. 71). The petition for appeal was presented and allowed on November 13, 1952 (R. 74). The jurisdiction of this Court is conferred by 28 U.S.C.A. Sections 1253, 1336, 1398, 2101(b), 2284, 2321-2325, 49 U.S.C.A. Sections 17(9) and 916(a). Probable jurisdiction was noted on February 2, 1953 (R. 80).

PRELIMINARY STATEMENT

Appellee, Cornell Steamboat Company, is limited in a certificate issued by the Interstate Commerce Commission to it to operation by water on the Hudson River by towage.* Such certificate was granted under the "grandfather" provisions (section 309) of the Interstate Commerce Act, this carrier having been found engaged in the towage business on and since "grandfather" date. In fact, it has been in the towage business for a period of 115 years (R. 60).

On the other hand, the certificate issued to appellant in 1948, which carried forward the same terms as those in the certificate of its predecessor (Hutton) issued in 1944, and which was authorized to be transferred in 1947 (R. 56) contained no reference to the performance of "towage" service and limited the carrier to operation "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels" in the transportation "of commodities generally" between points indicated on the Hudson River (R. 57).

Such specification was well recognized prior to the time of the Hutton certificate of 1944, the authorized transfer of 1947, and the certificate of 1948 as the specification of a service, commonly known as "freighting", which is a dif-

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*The operation authorized was "by towing vessels in the performance of towage of non-self-propelled freight-carrying vessels, loaded or light," between various points on the Hudson River. *Cornell Steamboat Co. Contract Carrier Application*, 250 I.C.C. 577 (R. 30).

ferent service from towage and which does not include authority to perform towage.

It is to be noted that the certificate in authorizing "the transportation of commodities generally" specifies that this is to be performed (a) "by self-propelled vessels", namely, vessels having their own power and carrying the commodities on board, and (b) by "non-self-propelled vessels", which likewise would have commodities carried on board but would be different from the self-propelled vessels in that they would obtain their power through incidental and separate power boats, or as stated in the certificate the power would be furnished "with the use of separate towing vessels" (R. 57). The certificate does not provide, as in general towage cases that the service is to be "by" tugboat or towing vessel in the performance of towage. The language of the certificate itself, contrary to the contention now made by appellant and in accord with the view previously admitted by it, provides for freighting and not towage.

The 1944 certificate to Hutton and the 1948 certificate to appellant, carrying forward the terms of the 1944 certificate, were made pursuant to the "grandfather" provisions of the Interstate Commerce Act. The certificate was limited to freighting, since this was the type of service performed during the crucial "grandfather" period by means of "self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels". The certificate gave the carrier what it was entitled to receive and no more.

The 1947 authorization by the Commission of transfer of rights under the 1944 Hutton certificate (with an exception as to territorial scope not material here) to appellant was pursuant to the agreement of the latter to purchase such rights for the sum of only $2,750 (R. 17). There was no contention in that case that at the time of such transfer, appellant thought it was acquiring towage rights or was entitled to anything more than freighting rights which

had been based on service performed in the "grandfather" period. The contention is made by appellant in this Court at this late date that the 1947 report of the Commission may be construed to indicate that general towage rights were included but this overlooks admissions made at the hearing and the terms of the certificate itself. The small consideration itself was some indication of the limited rights sought to be, and actually, acquired.

Appellant, prior to acquiring the Hutton rights in 1947, had not operated as a water carrier subject to the Act. Its principal business was that of producing stone and other products (R. 28). Its private business, it is believed, thus placed it in a particularly formidable competitive position.

Neither the 1944 Hutton certificate nor the 1948 certificate to appellant was to become effective immediately. As to the former a period of more than two and a half months before the effective date was provided (R. 14) and as to the 1948 certificate, a period of a month and a half before the effective date (R. 58). Under the Commission's Rules of Practice the period for reconsideration by the entire Commission of a decision granting an application in whole or in part is 30 days. In spite of the implied lack of opportunity relied upon in appellant's brief, the fact is that ample opportunity was afforded Hutton.

Neither Hutton nor appellant made any objection or filed any petition challenging in any way the 1944 certificate or the 1948 certificate, within the period provided for in the certificates or under the Commission's Rules of Practice. Nor was there any objection taken within the time allowed in the transfer case but instead there was vigorous contention by appellant that the 1944 certificate could not be attacked collaterally and should stand (R. 26). The terms were thus not only consented to but were insisted upon.

Appellant apparently recognizing that its certificate did not permit "towage" as distinguished from "freighting" authorized in its certificate, filed a tariff with the Commission providing for rates on various commodities, with

allowances to shippers in connection with barges furnished by them. By this device and by a sharp reduction in the net rates on brick (the regular rates less allowances) appellant undercut the towage rates of Cornell, appellee, and succeeded in diverting business amounting in one year to a revenue loss of over $250,000 (R. 65, Tr. 141, 142).*

On complaint by Cornell to the Commission that appellant was thereby performing an unauthorized and unlawful towage service not permitted by appellant's certificate, the latter filed a petition for interpretation with the Commission. There is no indication of any claim by appellant in the petition that it was entitled to towage rights. The contention appeared to be that under its freighting rights the allowance practice could be justified. As late as the hearing in the case before the Commission on February 23, 1951, on Cornell's complaint and appellant's petition, appellant through counsel admitted that its operating rights were limited to freighting and did not include towage. (See quotation, *infra*, page 23)

In the original brief filed by appellant with the Commission on April 13, 1951,** following the hearing just mentioned, there is no contention that appellant's certificate is invalid in any respect. The contention was that "the only question for determination in this proceeding is whether or not the Callanan Company has exceeded the authority of its certificate and the answer to that question must be found in the language of the certificate and not elsewhere" (p. 18).

Later by exceptions brief, dated June 18, 1951, following an adverse report by the hearing examiner, appellant for the first time made the contention that the certificate itself was invalid to the extent that it contained any specification of the service to be rendered as a water carrier

* The testimony before the Commission is not printed but by stipulation may be referred to (R. 79).

** This document is not printed but may be referred to by either party under the stipulation (R. 79).

(p. 22). It also contended that even if its certificate were not invalid in this respect, it did not preclude the performance of the service under the allowance practice complained of. There was no contention that the 1944 certificate was a revocation of the 1942 certificate. A reply brief was filed by Cornell on July 12, 1951, to appellant's exceptions.*

Thereafter, on July 20, 1951, appellant filed with the Commission another petition for the first time making the point that the Hutton certificate of 1944, which included a specification of equipment to be used in performing the service authorized, should be annulled as an improper revocation of the original Hutton certificate of 1942 which contained no such specification; and that the 1942 certificate should be restored. A reply was filed by Cornell emphasizing the fact that it was too late under the Commission's rules to make such contention and that it was otherwise without merit. The petition was denied by order of the Commission, dated July 7, 1952.**

The Commission by Division 4 issued its report and order, dated October 18, 1951, here under attack (R. 22). It overruled appellant's contentions and concluded that appellant "has been and is performing the service of towage without appropriate authority therefor under section 309 of the act, and that the rates, charges, and allowances in its tariff I.C.C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful" (R. 32). More specific findings will be referred to later. As above indicated, the Commission also by its order of July 7, 1952, denied appellant's petition to have the Hutton certificate of July 17, 1942, restored and the 1944 certificate annulled.

The United States District Court for the Northern District of New York, Circuit Judge Clark, Chief Judge Brennan and District Judge Foley sitting, concluded in an opinion by Circuit Judge Clark that the Commission had acted within its authority, that judgment should be entered for

* The exceptions brief and reply brief are not printed but by stipulation may be referred to (R. 79).

** The petition, reply and order are not printed but by stipulation may be referred to (R. 79).

the defendants, and that the action should be dismissed on the merits (R. 59-71).

There is no contention by appellant that it has been denied a fair hearing, that any alleged constitutional rights have been infringed, or that the underlying findings in the Commission's report are not supported by the evidence before the Commission.

As stated by the District Court "there is substantially no conflict as to the basic facts" and "the issue arises as to the law applicable". Fundamentally, as the Court points out, appellant, holding a certificate of public convenience and necessity for "freighting" is endeavoring to extend this to include "towing" on grounds which the hearing examiner, Division 4, the entire Commission and the District Court have concluded to be clearly without merit.

QUESTIONS PRESENTED

Appellee, Cornell Steamboat Company, is vitally concerned with the questions in this case. It believes that appellant, although acquiring a certificate known to be, and actually, limited to freighting (by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels) in the transportation of commodities generally and not authorizing the performance of towage, the service to which Cornell is restricted in its certificate, nevertheless seeks by the allowance tariff here in question and a belated attack on its predecessor's certificate unjustly to expand its operating rights beyond those to which it is, or was entitled under the "grandfather" clause or under the transfer of rights to appellant, and thus to invade the field of towage not contemplated or authorized by its certificate, with severe injury to Cornell.*

* The District Court in concluding, as did the Commission, that the service performed by Callanan under the allowance device above mentioned was and is actually towage, not authorized by its certificate, stated (R. 64):

> "In fact it is because of this operation [by Callanan] and rates and allowances it has made upon receiving shippers' scows laden with New York bound commodities that plaintiff has been able to undercut Cornell, causing—on its initial purchase of $2,750—a loss to Cornell asserted by the latter to have reached $250,000 of revenue in a single year". (I.C.C. transcript of testimony, pp. 141, 142).

More specifically it is believed that the following questions are here presented:

(1) Is this a case in which the Commission's findings and conclusions are to be considered in the light of the broad discretion conferred upon it under the Interstate Commerce Act and can they be set aside without a clear showing that its authority has been exceeded or its discretion abused?

(2) Assuming the validity of appellant's 1948 certificate and the 1944 certificate on which the latter is based, are not the terms of such certificate such as to exclude towage and is not appellant's contention of an alleged unauthorized incorporation by reference of Commission classifications of carriers without substance?

(3) Timely objection not having been taken by appellant to the 1944 certificate of its predecessor (Hutton), to the 1947 report and order permitting transfer of the 1944 Hutton rights to appellant, and to the 1948 certificate which was its original and only certificate, was it not too late to attack the validity of the 1944 certificate 7 years after its effective date, the transfer order 4 years after entry thereof, and the 1948 certificate, 3 years after issuance thereof?

(4) Also even if, contrary to the fact, appellant's contention is not too late, is not the Commission justified in holding that it is not automatically barred from specifying in the certificates issued the general types of equipment and the services to be performed, and thus is not to be compelled to tear down its long-established system of water carrier regulation?

(5) Even if, contrary to the fact, appellant's contentions were not too late, was not the Commission justified on the merits in refusing to upset the clarifying order of 1944 as an alleged unauthorized revocation of the 1942 certificate, when the 1944 certificate, the 1947 transfer of rights under the 1944 certificate, and the 1948 certificate, limiting appel-

lant to freighting and not including towage, were not objected to, but were instead consented to, and insisted upon and constituted independent determinations?

(6) Is not the Commission justified in finding that appellant's operation under its allowance tariff amounts in fact to towage and that such towage being unauthorized the allowance practice is unlawful?

(7) Is not the claim of appellant as to alleged failure by the Commission to set forth findings and conclusions in compliance with section 8(b) of the Administrative Procedure Act too late when made after conclusion of the proceeding before the Commission and is it not otherwise without merit?

Each of these questions, it is believed, should be answered in the affirmative.

ARGUMENT

I. THE COMMISSION IS VESTED WITH BROAD DISCRETION TO ADMINISTER THE WATER CARRIER PROVISIONS OF THE INTERSTATE COMMERCE ACT IN PROMOTING A SOUND TRANSPORTATION SYSTEM AND PROTECTING THE PUBLIC INTEREST.

Congress in 1940 added water carriers to the types of carriers which had previously been subjected to regulation under the provisions of the Interstate Commerce Act. Important among the regulatory provisions with respect to water carriers were those authorizing the Commission to deal with rates and to regulate competition in the public interest by the issuance of certificates of convenience and necessity to water carriers which on January 1, 1940, the "grandfather" date, and thereafter had shown themselves to have been in bona fide operation and to carriers which could show as to proposed new operation that public convenience and necessity required service by them and that they were qualified to perform such service.

The convenience and necessity provisions of the Act have long applied to railroads and motor carriers. The provisions as to water carriers follow generally those applicable to motor carriers both as to "grandfather" applications and applications as to new services. As later pointed out this Court has referred to what appears to be a somewhat more liberal purpose under the statute in the issuance of certificates to water carriers than to motor carriers but it is not believed that the basic theory and purpose of the convenience and necessity provisions are different with respect to water carriers from those applying to motor carriers under the Act.

It appears appropriate here to point out the language of this Court in *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945), in which it sustained a water carrier certificate of convenience and necessity (p. 241):

> "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65 S. Ct. 1490. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies".

The *Parker case* cited was a motor carrier case and indicates the similar purposes underlying the motor carrier and water carrier certificate sections of the Act.

Clearly the mere filing of a complaint by appellant does not make the Commission's order here under consideration "suspect" but instead places upon appellant the heavy burden to show invalidity. In *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503 (1944) this Court

upheld a rate order of the Commission, saying, among other things (512, 513):

> "'Moreover, the Commission's order does not become suspect by reason of the fact that it is challenged. It is the product of expert judgment which carries a presumption of validity. And he who would upset the rate order under the Act carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences'. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 602, 64 S. Ct. 281, 288."

A leading case as to the Commission's broad discretion and the limited scope of court review is *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946), sustaining an order of the Commission authorizing certain motor carrier extensions under the convenience and necessity provisions of the Act. There the Court said (535, 536):

> "It is not true, as the opinion stated, that '* * * the courts must in a litigated case, be the arbiters of the paramount public interest'. This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law."

See also *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534 (1942), a rate case in which the narrow scope of judicial review is emphasized and the statement is made (p. 546):

> "Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems"

In *Warner* v. *United States*, 97 F. Supp. 580, 583, (1950), affirmed per curiam by this Court, 341 U.S. 907 (1951), a Three-Judge Statutory Court upheld an order of the Commission against attack by a water carrier that its operating authority had been unduly restricted as to future "freighting operations", "towing operations", and certain other operations. The broad scope of the Commission's discretion and the limited extent of review were therein pointed out.

The lower Court in the present case stated that it agreed "with the Commission's assertion of power to make the classification in question", limiting appellant to freighting and excluding it from towing in accordance with "grandfather" services shown. The Court continued (R. 70):

> "We should add that had we been in more doubt we should have nevertheless felt in some compunction to yield to the Commission's informed judgment and settled rulings on a matter so much within its competence."

The Court then cited *United States* v. *Detroit & Cleveland Nav. Co., supra; United States* v. *Pierce Auto Freight Lines, supra,* and *Alton R. Co.* v. *United States,* 315 U.S. 15 (1942).

In the background of these familiar decisions as to Court review of Commission orders, it is believed unmistakably clear that the order here under attack is valid and the Court below should be sustained.

II. APPELLANT'S CONTENTION THAT ITS CERTIFICATE MAY PROPERLY BE CONSTRUED TO INCLUDE TOWAGE AND THAT THERE HAS BEEN AN IMPROPER ATTEMPT TO INCORPORATE BY REFERENCE IN THE CERTIFICATE A CARRIER CLASSIFICATION OTHER THAN TOWAGE IS FALLACIOUS.

The contention of appellant here considered, unlike the contentions dealt with in parts III, IV and V of this brief, is based on the assumption that its present certificate and the provisions thereof are valid. Its contention is that the certificate by its terms is broad enough to authorize towage and that the Commission's view to the contrary is erroneous. In support of its contention it resorts to the theory that the Commission in concluding that towage is not authorized by the certificate has improperly incorporated by reference a carrier classification assumed to be elsewhere made by the Commission.

Appellant's contention is fatally infirm in disregarding (a) the great weight to be attached to the Commission's interpretation of its own certificates, (b) the history of the certificate, including the clarifying amendment of 1944 patterning the authority to embrace the only service (freighting) to which appellant was shown to be entitled under the "grandfather" clause, (c) the admissions by appellant that it knew its certificate did not include towage, (d) the well-recognized meaning of the certificate in the light of other decisions prior to the issuance of the certificate to appellant, and (e) the absence of alleged incorporation by reference into appellant's certificate but instead a clarifying amendment in 1944 in effect excluding towage.

(a) Great Weight is to be Attached to the Commission's Interpretation of its Certificate and this is True as to its Conclusion that Towage is Not Authorized by Appellant's Certificate.

In view of the important duties and responsibilities placed upon the Interstate Commerce Commission by Congress in respect to the administration of the Interstate Commerce Act and the effectuation of the National Transportation Policy, great weight should properly be accorded the interpretation by the Commission of certificates of convenience and necessity issued by it.

In *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817, (certiorari denied 342 U.S. 830), the Court of Appeals for the Ninth Circuit upheld an interpretation by the Commission of a motor carrier certificate as to "off-route" points. The Court said (p. 817):

> "The Commission appears to have no formal rule or regulation defining the term 'off-route-point'. However, in many decisions passing on applications for operating rights the Commission has restricted the term to points reasonably close to the carrier's regular route. * * * The general practice of the Commission thus supports its restricted interpretation of the present certificate".

Then emphasizing the rule to apply in the construction by the Commission of certificates granted by it, the Court said:

> "The Commission's construction of its certificates, unless clearly wrong or arbitrary, is to be accepted by the courts. Adirondack Transit Lines, Inc. v. United States, D.C., 59 F. Supp. 503, affirmed 324 U.S. 824, 65 S. Ct. 688, 89 L. Ed. 1393".

See also *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489, 490 (1942). In *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549 (1940) it was

said that the Commission's interpretations of the Act "are entitled to great weight".

There can be no doubt that in the present case the Commission has deliberately concluded that appellant's certificate does not authorize towage and that it "has been and is performing the service of towage without appropriate authority therefor under section 309 of the Act * * *" (R. 32).

The Commission in its report here under attack referred to Cornell's complaint that while it in its certificate is limited to a "mere towage service", appellant is restricted by its certificate to the transportation of property by self-propelled vessels and "by non-self-propelled vessels with the use of separate towing vessels (commonly referred to as freighting)" and that the performance of towage was an unauthorized operation in violation of the law (R. 28). The Commission further said (R. 30):

> "Its [Cornell's] certificate to operate as a common carrier by water is limited to that service [general towage] only, while the petitioner's certificate, as above indicated, is limited to the performance of freighting service by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels. The transportation of property by a water common carrier by non-self-propelled vessels with the use of separate towing vessels, for the purpose of the voyage, is in effect service by one vessel or unit under the contract of affreightment. The service performed by towers falls within a classification distinguishable from that just mentioned. They propel vessels from place to place and, unless the transportation is exempt, are subject to our jurisdiction under part III. See *Cornell Steamboat Co.* v. *United States*, 321 U.S. 634. The authority to perform such towage is not included in the authority granted to water carriers to engage in transportation of commodities by non-self-propelled vessels with the use of separate towing vessels".

The Commission analyzed the service performed by appellant under the allowance tariff here in question and con-

cluded that the service was in fact a towage service (R. 32). It therefore found, as indicated above, that such service was performed "without appropriate authority therefor" (R. 32).

The District Court aptly points out that the distinction between freighting and towage has long been recognized in Court cases, citing *Stevens* v. *The White City*, 285 U.S. 195, 200 (R. 61).

No reason has been shown by appellant to justify overturning this careful interpretation of appellant's certificate.

(b) The History of Appellant's Certificate, Including the Clarifying Amendment of 1944 Patterning the Authority to Include Service by Freighting and Not Towing in Accordance with the Service to Which it was Entitled Under the "Grandfather" Clause Shows the Fallacy of Appellant's Contention Here.

In considering the history of appellant's certificate it is believed important to bear in mind particularly—

(1) the original certificate of July 17, 1942, to Joseph R. Hutton, appellant's predecessor in interest (R. 6-10) (250 I.C.C. 804),

(2) the amended certificate of March 7, 1944 to Hutton (R. 11-14) (260 I.C.C. 804),

(3) the order, dated August 18, 1947 (265 I.C.C. 813), authorizing the transfer of part of the operating rights covered by the amended certificate of 1944 from Hutton's administratrix to appellant (R. 15-22), and

(4) appellant's certificate dated February 5, 1948, pursuant to the order of transfer (R. 27, 56).

(1) **Original Hutton certificate of July 17, 1942.** This certificate to appellant's predecessor in interest certifies "That public convenience and necessity require operation

by applicant as a common carrier by water, in interstate or foreign commerce, in the transportation of commodities generally between points" on the Hudson River below its junction with the New York State Barge Canal, and on the New York State Barge Canal and certain waters connecting therewith (R. 9, 10). It was ordered in the certificate "That said applicant be, and it is hereby, authorized to continue operation as specified above, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission" (R. 10).

The certificate, it is to be noted, contains no provision as to the type of equipment to be used in rendering the service authorized or mention of any type of service to be permitted. The certificate, however, is based on a showing of past operation under the "grandfather" provision of the Interstate Commerce Act (section 309, 49 U.S.C.A. section 909). A certificate under this clause must be based on a showing of bona fide operation on and since the "grandfather" date, January 1, 1940.

The certificate incorporates by reference the Commission's report of the same date (R. 9). This report shows the type of operation which the carrier performed in the crucial "grandfather" period (R. 7):

> "Applicant [Joseph R. Hutton] had been in operation for 37 years. He owns and manages 1 steam power boat of about 240 horsepower, and 4 barges, all of which are *operated as a unit*. The power boat is used to tow the barges but also carries about 150 gross tons of freight. On occasion other barges are rented or chartered for operation in applicant's fleet". (Emphasis supplied)

The report further shows that during the 1939 and 1940 seasons 13 commodities (not including bricks) were transported by Hutton within the territorial limits referred to in the certificate.

It is significant that the operation thus found as the basis for the "grandfather" certificate (the finding being included by reference in the certificate) is that there were 1 power boat and 4 barges "all of which are operated as a unit". This service with its own barges is the conventional "freighting" service as distinguished from towage. The renting or chartering of barges for operation in Hutton's fleet also confirms the character of service of freighting and not towage. The report contains no mention of towage services performed in moving shippers' barges or of any allowance arrangement providing for any payments to them. The case was uncontested (R. 7).

(2) **The clarifying certificate of March 7, 1944 to Hutton.** By its certificate of this date, described as an "Amended Certificate", the Commission cancelled the original certificate of July 17, 1942. This amended certificate contained changes from the provisions of the original 1942 certificate in that it specified the type of vessels to be used. As previously indicated, the original certificate contained no such specification.

In the report accompanying the order and made a part thereof the Commission pointed out that in the prior report the type of vessels to be used had not been specified and that "We have, therefore, reopened this proceeding upon our motion for the purpose of giving further consideration to this matter".

Apparently appellant seeks to paint this reopening on the Commission's own motion as in the nature of an arbitrary exercise of power. It fails to point out that by the very terms of the certificate, dated March 7, 1944, it was not to take effect and be in force until May 29, 1944, and that under the Commission's Rules of Practice the applicant had ample opportunity to request reconsideration within a period of 30 days after such order. There was no attempt to seek reconsideration or challenge the amended certificate within the time provided. The reason appears

obvious. The amended certificate and order gave the applicant exactly what he was entitled to receive under the "grandfather" clause, namely, authority to perform freighting by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels—a service which he had been performing during the "grandfather" period and which he was entitled to continue under the "grandfather" clause.

In indicating its reasons for specifying in the amended certificate the general types of equipment which might be used under the certificate, the Commission said (R. 12):

> "In the absence of any limits in the certificate with respect to the type of vessels to be used in the performance of the transportation authorized, applicant would be free to extend its operations and perform services different from those performed by him on and since the statutory date. He would thus be in a position to enter into new fields of transportation without first establishing, in accordance with the provisions of the Interstate Comerce Act, that such extension of his services is required by the present or future public convenience and necessity or is consistent with the public interest and the national transportation policy declared in the act. For these reasons we will modify the authority previously granted by specifying the types of vessels operated by applicant on and since January 1, 1940".

As later pointed out, it was well recognized in other decisions of the Commission that such specification of equipment for use in the transportation of commodities generally, and without express reference to the authorization of towage, indicated the authorization of a freighting service only. From the language quoted above as to excluding applicant from extending its operation without a showing of public convenience and necessity, it is difficult to conceive of any further service except towage that could have been within such purpose, and such service is clearly excluded.

It is to be noted that the Commission in its report accompanying the 1944 amended certificate describes the operation during the critical "grandfather" period in almost the same words as in the original 1942 report (R. 12). The Commission found under the "grandfather" clause (R. 12):

> "Upon reconsideration, we find that on and since January 1, 1940, Joseph R. Hutton has been engaged in operation as a common carrier by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in [the area indicated in the certificate]".

The 1944 amended certificate and order certified (R. 13):

> "That public convenience and necessity require the conti nance of operation by applicant as a common carrier by water, by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels in interstate or foreign commerce, in the transportation of commodities generally between points in" [the area set forth in the certificate, this area being the same as in the original certificate].

It was then ordered that the carrier be "authorized to continue operation as specified above * * *".

As indicated, Hutton had no just claim to authority to perform towage, because such service had not been performed in the "grandfather" period. He made no contention that he should have such authorization. The time for filing a petition for reconsideration expired before the amended certificate became effective on May 29, 1944, and no such petition was filed. Under the circumstances Joseph R. Hutton, appellant's predecessor in interest, must as a matter of law be deemed to have consented to the amended certificate and order and the limitation therein to freighting, namely, transportation "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels."

(3) The order, dated August 18, 1947, authorizing the transfer of part of the operating rights covered by the amended certificate of 1944 from Hutton's administratrix to appellant. By this order, and the report accompanying it of the same date, the Commission authorized "transfer to The Callanan Road Improvement Company [appellant] of the amended certificate dated March 7, 1944, issued to Joseph R. Hutton" in so far as the certificate authorizes operation on the Hudson River only (R. 21, 22). The Commission stated that upon receipt of certain information of confirmation of the sale, "a certificate superseding the amended certificate will be issued to the transferee" (R. 21).

It is to be noted that there was no reference to any transfer of rights which might be claimed under the 1942 certificate and that the transfer was as to rights under the 1944 amended certificate. The 1942 certificate, as previously pointed out, had been cancelled.

The 1944 certificate contained no reference to towage service but authorized only a freighting service. In the *transfer case* there was no suggestion by appellant that it expected to perform a towage service and there was no objection that the rights to be transferred under the 1944 certificate were subject to a specification of types of equipment and service. The same counsel appeared for appellant in that case as the case here under consideration (R. 14).

The purchase price, as previously noted, was only $2,750. The consideration would seem to indicate that the rights acquired were not the all-inclusive ones here claimed. No attempt was made by appellant to contest the order of the Commission in the *transfer case* or file a petition for reconsideration.

However, as indicating that appellant was satisfied with and consented to the freighting rights authorized to be transferred to it under the 1944 Hutton certificate, it is to be noted that appellant strenuously objected in the *transfer case* to a protest by a water carrier association seeking to

have the certificate changed to exclude operation by "self-propelled vessels." Appellant through its counsel urged (R. 20):

> "that the certificate may not be attacked collaterally in this proceeding, and * * * that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation in whole or in part, citing *United States v. Seatrain Lines, Inc.*, 329 U.S. 424".

This indicates that appellant not only consented to the terms of the amended certificate authorized to be transferred, including the provision for freighting, but insisted upon the terms of that certificate.

(4) **The certificate and order of February 5, 1948, to appellant pursuant to authorization in the transfer case.** Following the order of August 18, 1947, authorizing transfer of rights to appellant under the 1944 Hutton certificate, to the extent of operations on the Hudson River, the Commission on February 5, 1948, issued its certificate and order (referred to as its Second Amended Certificate and Order) which was the first and only certificate which had been issued to appellant (R. 56). The certificate carries forward the same provisions as to freighting service contained in the amended certificate of March 7, 1944, namely, "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points" on the Hudson River (R. 57).

While the date of this certificate was February 5, 1948, it was by its terms not to become effective until March 19, 1948, a month and a half later. No objection was made by appellant or by any one else to the terms of such certificate and no request for reconsideration or review was made, within the time provided for in the certificate or under the Commission's Rules of Practice.

The above facts as to the Hutton certificate, the transfer order, and appellant's certificate point clearly to the correctness of the Commission's finding that appellant has operating rights under its certificate to perform freighting only and not towage.

(c) By its words and actions appellant has admitted that it knew the certificate granted to it authorized only freighting rights and did not include authority to perform towage.

Admission by appellant at the hearing that its certificate does not authorize towage but permits freighting service only is significant. As late as the hearing on February 23, 1951, in the proceeding which resulted in the order here under attack, the following admission was made by counsel for appellant (I.C.C. tr pp. 9, 10) :*

> "Mr. Curry [counsel for Cornell]: It is my understanding that it is admitted by the petitioner [appellant] that the amended certificate which it has received under this transfer authority does not include the right to perform towage.
>
> Mr. Wilson [counsel for Callanan]: That is true, Mr. Curry. It includes the right to operate as a common carrier in the transportation of general commodities, with the use of non-self-propelled vessels and separate towing vessels.
>
> Mr. Curry: That is my understanding. Thank you.
>
> Exam. Konigsberg: And it is your position that that type of service performed is not towage but freightage?
>
> Mr. Wilson: That is right, and that the allowances published in the tariff are fully authorized and just and reasonable under Section 314, and so forth".

This admission not only confirms the fact that appellant's certificate authorizes freighting only and does not permit towage, but it clearly indicates that appellant knew this to

* The transcript of testimony is a part of the record in this Court and is covered by stipulation as to its use (R. 79).

be true when it acquired the freighting rights under the authorization of the transfer order of 1947 above referred to. As above noted the same counsel was in the *transfer case* as in the present case.

The filing by appellant of an application for temporary authority to perform towage was an admission that it had no such authority under its existing certificate. The fact that such request for temporary authority was filed by appellant with the Commission and that such request was denied, is set forth in the Commission's report in the present case (R. 29).

Appellant's attempt to have the Commission approve the transfer of towage rights to it from another carrier and its application for a permanent certificate to perform towage indicate admissions of absence of towage authority under its existing certificate. While appellant has claimed that the filing of such application was not an admission by it but a precautionary measure the fact that the applications were filed and were pressed indicates not only a lack of confidence in the claim here made of towage authority under the existing certificate but is evidence that it knew it had no such authority.*

The resort by appellant to the allowance device here in issue is an admission that it had no towage rights. If appellant really had towage rights under its present certificate, it seems highly strange that it did not publish a simple towage tariff, rather than to resort to the roundabout scheme of allowances to shippers furnishing their barges. Apparently the allowances were conceived with the thought that they might be justified under the authority to perform freighting only.

The above admissions by appellant, through words or actions, confirm the conclusion of the Commission that

* As the District Court points out these applications were denied (R. 66; 285 I.C.C. 137). These circumstances emphasize the unjustness of appellant's attempt by the strained reasoning relied upon here to expand its certificate to cover services (towage) which it is not certified to perform and which it cannot justify by a showing of public convenience and necessity.

appellant's certificate does not include towage service, but is limited to freighting.

(d) The distinction between freighting and towage was well recognized in decisions of the Commission prior to the 1944 Hutton certificate, the 1947 transfer order, and the 1948 certificate issued to appellant, and such decisions confirm the absence of towage authority in appellant's certificate.

The distinction between freighting and towage has long been recognized in decisions of the Commission. "Freighting" as distinguished from "towage" is well established by decisions of the Commission and was well known prior to the issuance of the amended certificate of March 7, 1944 to Hutton. As previously noted, the Commission in specifying in the 1944 certificate the general types of equipment which could be used and the service which could thereby be performed (freighting) pointed out that this was done in order that the service authorized might conform to the service shown to have been rendered during the critical "grandfather" period.

Otherwise, the carrier, in the language of this Court in motor carrier "grandfather" cases, would have been able "to enlarge and expand [its] business beyond the pattern which it had acquired" prior to "grandfather" date and would have been able to bring about "a metamorphosis" not sanctioned by the Act. Instead the "grandfather" clause should be utilized to preserve "the position which the carrier had obtained in the nation's transportation system". See *Noble* v. *United States*, 319 U.S. 88 (1943), *Crescent Express Lines* v. *United States*, 320 U.S. 401 (1943), and *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942).

From the very beginning the Commission recognized towage as a separate service. The first reported decision involving towage after the passage of the 1940 water carrier amendment was the *Orrell case*, 250 I.C.C. 67, which

was decided on October 30, 1941, long before the original Hutton certificate of July 17, 1942. In the *Orrell case* the certificate was issued to it as a common carrier "by tugboats in the performance of general towage". Another early case was the *John L. Goss case*, 250 I.C.C. 101, decided November 10, 1941, where the certificate authorized applicant to operate as a common carrier "by tugboats, * * * in the performance of general towage".

The certificate of this appellee (Cornell) restricts it to operation "by towing vessels in the performance of towage".

The distinction between this service and freighting is clearly indicated by the fact that in numerous decisions before the Hutton 1944 certificate, the Commission issued certificates authorizing transportation of commodities (a) "by non-self-propelled vessels with the use of separate towing vessels" and (b) "by towing vessels in the performance of general towage". These cases included *Tidewater Transp. Co., Common Carrier Application*, 260 I.C.C. 30 (1943), affirmed in *Inland Navigation Co. v. United States*, 76 F. Supp. 567 (1948), *James McWilliams Blue Line, Inc., Com. Car. Application*, 260 I.C.C. 15 (1943), *Upper Mississippi Towing Corp., Com. Car. Applications*, 260 I.C.C. 85 (1943), *Southern Transp. Co. Contract Carrier Application*, 260 I.C.C. 129 (1944).*

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*Other decisions by the Commission (not printed in full) which were made prior to the March 7, 1944 amended certificate, above mentioned, and which provided for both "freighting", namely, transportation of general commodities by non-self-propelled vessels with the use of separate towing vessels, and towage, by tugboats or towboats, because, unlike the present case, the "grandfather" operation, or a showing of public convenience and necessity, included both, are the following: *Columbia Tug Boat Co.*, 250 I.C.C. 819 (Aug. 10, 1942); *Knappton Towboat Co.*, 250 I.C.C. 812 (Dec. 29, 1942); *Coyle Lines*, 250 I.C.C. 820 (Mar. 9, 1943); *Shaver Transportation*, 250 I.C.C. 812 (May 10, 1943); *Willamette Tug and Barge Co.*, 250 I.C.C. 818 (June 2, 1943); *Western Transportation Co.*, 250 I.C.C. 807 (June 12, 1943); *Delta V. Smyth*, 250 I.C.C. 817 (June 23, 1943); *Olson Tug Boat Co.*, 260 I.C.C. 814 (July 3, 1943); *Westport Towboat Co.*, 260 I.C.C. 812 (July 21, 1943); *Diesel Towing Co.*, 260 I.C.C. 809 (Aug. 11, 1943); *Orin Shepard*, 260 I.C.C. 810 (Aug. 18, 1943); *Olympia Towing Co.*, 260 I.C.C. 814 (Aug. 31, 1943); *Harbor Towing Co.*, 260 I.C.C. 810 (Sept. 4, 1943); *Portland Tug & Barge Co.*, 260 I.C.C. 817 (Sept. 8, 1943); *Atlas Tug Service*, 260 I.C.C. 809 (Sept. 25, 1943); *Ohio River Co.*, 260 I.C.C. 810 (Sept. 29, 1943);

The separate authorization of these two types of services through the specification of equipment used in connection therewith is a clear recognition of the difference between such services and the importance of specifying them so as to avoid improper expansion of operation beyond the scope justified by previous operation in the "grandfather" period and to prevent disruption of the "competitive balance of carriers over the same route" by unauthorized services. *Erie & St. Lawrence Corp. Contract Carrier Application*, 260 I.C.C. 235, 238; *Norfolk, Baltimore and Carolina Line, Inc., Ext.—James R.*, 265 I.C.C. 247, 253, 254, affirmed as to this matter, by the entire Commission, 265 I.C.C. 313; and *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, 78.

Certificates not specifically providing for towage service, as in the present case, do not authorize such service. If, for example, a certificate authorizes the transportation of *commodities* it cannot be assumed that it also authorizes the transportation of *passengers* unless the latter are expressly referred to in the certificate. Likewise, the specification of a freighting service in a certificate, namely, transportation of commodities "by non-self-propelled vessels with the use of separate towing vessels" cannot be assumed to include the distinct and different service of "towage" by towing vessels.

Appellant is entirely incorrect in assuming, as it does, that the Commission has ever held that towage is included in authority to perform general transportation (freighting) by non-self-propelled vessels with the use of separate towing vessels. Appellant's confusion is in failing to distinguish the different categories in the Commission's certificates from the question whether in a particular case the

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Tacoma Tug & Barge Co., 260 I.C.C. 815 (Sept. 29, 1943); *Washington Tug & Barge Co.*, 260 I.C.C. 814 (Sept. 29, 1943); *American Tug Boat Co.*, 260 I.C.C. 814 (Oct. 4, 1943); *Pioneer Towing Co.*, 260 I.C.C. 814 (Oct. 22, 1943); *Grizzaffi Motor Co.*, 260 I.C.C. 819 (Nov. 1, 1943); *Blaske Lines*, 260 I.C.C. 813 (Dec. 3, 1943); *Arrow Tug & Barge Co.*, 260 I.C.C. 808 (Feb. 4, 1944); and *Inland Waterways Corp.*, 260 I.C.C. 808 (Mar. 4, 1944).

service is shown to be freighting or towage within the meaning of the certificate.

While the large number of cases decided by the Commission prior to the 1944 Hutton certificate specifying separately freighting and towage services indicate, as above pointed out, that towage services are not to be assumed to be included in a certificate unless specified, the Commission has expressly so ruled, as for example, in *Campbell Transp. Commn Carrier Application*, 260 I.C.C. 107 (1943). In that case the certificate authorized the water carrier to operate "by non-self-propelled vessels with the use of separate towing vessels, in the transportation of commodities generally". There the question was raised as to whether the manner in which the barges of shippers were used by the carrier amounted to a towage service. The Commission said that "Applicant [the carrier] concedes that the service performed by towers falls within a classification distinguishable from that of a carrier of property by non-self-propelled vessels" and that "It takes the position * * * that its own service is that of a carrier of property and not that of a tower".

After analyzing the service in question with a view to determining whether it could be classed within the term "transportation of commodities by non-self-propelled vessels with the use of separate towing vessels" or the term "general towage," the Commission concluded (p. 110):

> "The service to shippers, as described above, is unquestionably towage, within the meaning of 'general towage,' rather than complete freighting service. Authority to perform such towage is not included in the authority granted to water carriers to engage in the transportation of commodities by non-self-propelled vessels with the use of separate towing vessels. Towage is a distinct type of service or field of operation. Many carriers perform only towage, and others which were engaged in freight by barges and towboats did not perform such towage service for shippers during the 'grandfather' period. *Carriers whose certificates or*

permits do not specifically authorize the performance of towage are without authority to engage in such service" (Italics supplied).

The Commission earlier in its decision pointed out the injustice of permitting "carriers whose authority is limited to freighting by barges and towboats to invade the field of carriers engaged in the performance of towage" and who are limited in their certificates to the latter service. It said "Carriers that have been granted authority to transport commodities by barges and towboats have been required to show that they were in bona fide operation in the performance of complete freighting service in which they furnished both types of vessels" (p. 109)*.

It appears that the real question in the *Campbell case* was not whether the certificate in providing for freighting could be construed to include towage but whether on the facts as to the actual service there involved such service could be considered as freighting and thus be brought within the scope of the certificate.

Appellant contends that the *Campbell case* constituted a definite departure and a change in policy from an earlier holding in *Eastern Transp. Co. Contract Carrier Application*, 250 I.C.C. 505 (Oct. 19, 1942), where, it contends, the Commission held that special authority to tow shippers barges in the transportation of commodities generally under part III of the Act was not necessary because authority would be granted authorizing the transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels.

This indicates a misconception of the *Eastern Transp. Co. case*. The fact is that in the original case (250 I.C.C. 505) the Commission made the point that "Towage is a different service from transportation of commodities in non-

* While the manner in which the barges of shippers were used in that case was found to be towage, as is true in the present case, the Commission pointed out that under certain conditions shippers' barges could be used by a carrier in freighting service but only when as a part of its equipment in performing such complete freighting service" (p. 110).

self-propelled vessels with the use of separate towing vessels" that "Carriers performing towage compete with carriers performing the complete transportation, but upon a different basis" and "If applicant is able to perform the operations alternatively as different transportation services, discrimination would be likely to result". It then said "Proper regulation requires that we restrict the nature of applicant's service to the transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels" (p. 508). It thus made plain that the certificate would not permit towage but only freighting. The Commission expressly said that the "portion of the application seeking * * * authority * * * to perform towage will be denied" (p. 509). On reconsideration (250 I.C.C. 635) the carrier objected to the original certificate because it had excluded towage and would require it "to assume the status of carrier of the commodities on the shippers' barges, which status would subject applicant to many more forms of potential liability than were imposed upon it in the past as a tower of shippers' barges" (p. 636).* The Commission on March 6, 1943, modified the previous decision and authorized operation both "by non-self-propelled vessels with the use of separate towing vessels" and "by towing vessels in the performance of towage", since both services had been performed in the "grandfather" period.

Other decisions prior to the 1947 transfer order showed that freighting authority did not include towage. In addition to the numerous cases previously cited which showed the distinction between freighting and towage prior to the 1944 Hutton certificate, there were numerous decisions thereafter but prior to the time of the transfer proceeding of 1947 which were to the same effect. Appellant in that proceeding did not question the 1944 certificate but, as previously noted, insisted that the terms thereof should not be changed.

* Note the lower Court's reference to the well-known differences in admiralty citing *Stevens* v. *The White City*, 285 U.S. 195 (R. 61).

In *Central Barge Co. Applications*, 260 I.C.C 329 (1944) the Commission recognized the two services and authorized operation "by towing vessels in the performance of general towage" in addition to transportation of commodities "by non-self-propelled vessels with the use of separate towing vessels" (p. 341). It referred to the *Campbell case*, 260 I.C.C. 107, supra, and affirmed the view that "carriers whose certificates or permits do not specifically authorize the performance of towage are without authority to engage in such service". To the same effect are *Terrebonne Towing Co., Inc.—Exemp., Secs. 302(e), 303(h)*, 260 I.C.C. 551, 554, and *Union Barge Line Corp. Applications*, 260 I.C.C. 563, 564.

Among the numerous cases recognizing the distinction between towing and freighting is *Colle Towing Co. Applications*, 260 I.C.C. 681 (1946) where transportation of commodities "by non-self-propelled vessels with the use of separate towing vessels" is described as "freighting operations" and separate authority is granted to perform such service as towage. Other cases include *Mirene Co. Applications*, 260 I.C.C. 689, (1946), *Cumberland River Sand Co., Inc., Com. Car. Application*, 260 I.C.C. 734 (1946), *Baton Rouge Coal & Towing Co., Com. Car. Application*, 260 I.C.C. 761 (1946), and *American Barge Line Co. Applications*, 260 I.C.C. 783 (1946).

It is no wonder that appellant's counsel admitted at the hearing in the case which is now before the Court that its certificate does not include the right to perform towage (see supra p. 23).

(e) Appellant's contention as to alleged improper incorporation by reference into its certificate disregards the 1944 amendment excluding towage and is unsound.

Appellant apparently lays considerable stress on its theory that the Commission in holding that towage is not authorized by its certificate is resorting to an improper incorporation by reference of the classification of water carriers between those performing freighting services and

those performing towage services, as in the *Campbell case*, supra, and thus adds to the certificate a meaning not there. The argument is that the scope of the certificate is improperly narrowed to exclude the authority to perform towage.

A basic error in appellant's contention, it is believed, lies in the fact that the Commission in 1944 did not merely say that the 1942 Hutton certificate should be construed to exclude towage but by its 1944 Hutton amendment specifically inserted in the certificate the limitation that operation should be "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels" * * * in the transportation of commodities generally" and such description and specification was well known at the time, and was intended by the Commission, to mean that a freighting service and not a towage service was thereby authorized. The change was consented to not only by Hutton but by appellant in the transfer proceeding, as hereinbefore shown.

The situation is entirely different from such cases as *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289. There a motor carrier certificate authorizing transportation of "general commodities" with certain named exceptions, not including petroleum products in bulk in tank trucks, was claimed by competing truckers to exclude the latter type of transportation. The Commission said that the principal question was whether "the term 'general commodities' includes petroleum products in bulk, in tank trucks" (p. 291). It said "We believe the weight of authority supports the conclusion that the term 'general commodities' in certificates of public convenience and necessity means all types of commodities, except to the extent restricted," (p. 301) and, therefore, held that the transportation complained of was authorized by the certificate. The Commission further said, after referring to a number of its decisions (p. 299):

> "From the foregoing, the only reasonable conclusion that can be reached is that, at and since the time of the

original grant of authority to the defendant, the term general commodities has been considered by the Commission to include all commodities other than those expressly excepted''.

The case supports rather than militates against the decision in the present case. The Commission decisions were and have been clearly to the effect that the description of transportation in the 1944 Hutton certificate and in appellant's certificate means freighting and not towage, and there is no justification for torturing the language into providing for the latter. While complainants in the above case urged that the classification of carriers of ''general freight'' in another case, the *Classification case*, 2 M.C.C. 703, should control the Commission correctly held that it should not.

The *Coastal Tank Line case*, and similar cases relied upon by appellant are utterly inapposite here. Applicant's contention is without merit.

III. ASIDE FROM BEING OTHERWISE UNJUSTIFIED, APPELLANT'S CONTENTIONS AS TO ALLEGED UNAUTHORIZED REVOCATION OF THE ORIGINAL 1942 HUTTON CERTIFICATE AND AS TO CLAIMED UNAUTHORIZED SPECIFICATION OF TYPES OF EQUIPMENT AND SERVICE WERE MADE TOO LATE AND SHOULD THEREFORE BE REJECTED.

The facts in this case, it is believed, show that appellant's contentions as to alleged unauthorized revocation by the 1944 Hutton certificate of the 1942 certificate and as to alleged unauthorized specification of types of equipment and service in appellant's certificate are not only merely exigent afterthoughts but were not made within the time proper under the Commission's rules and are too late.*

* The District Court after referring to the fact that appellant had ''consented or waived objection'' to limitation of the certificates said ''Plaintiff's present attempt to expand its grant is an obvious afterthought stimulated by the exigencies of its competition with Cornell'' (R. 65).

Among such facts are the following:

(1) In issuing the Hutton certificate of March 7, 1944, cancelling the original 1942 certificate and specifying a freighting service as hereinbefore explained, provision was made for a period of over two and a half months after the date of the order before it or the certificate would become effective, and thus ample opportunity was afforded Hutton within which to object to or protest the certificate. Under the Commission's Rules of Practice a petition for reconsideration could be submitted within 30 days after the date of service of the decision or order granting an application in whole or in part (Rule 101(e)). There was no objection by Hutton within the time allowed, and in fact there has never been any objection by him or his administratrix.

(2) In the 1947 transfer proceeding, as previously indicated, the Commission approved transfer by Hutton's administratrix to appellant of operating rights under the 1944 Hutton certificate, except as to those on the New York State Barge Canal. Appellant not only did not object to the terms of that certificate but as the Commission said, concerning the protest of another carrier in that case that the rights transferred should not include the use of "self-propelled vessels" as provided for in the certificate:

> "Counsel for the applicants [Hutton's administratrix and appellant] points out that the certificate may not be attacked collaterally in this proceeding, and contends that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation in whole or in part, citing *United States v. Seatrain, Inc.*, 329 U.S. 424" (R. 20).

The same counsel in that case is counsel in the present case. These circumstances indicate that not only did appellant consent to the terms of the 1944 certificate but that it insisted that they should be left intact.

(3) The certificate of February 5, 1948, which was the first and only one issued to appellant was pursuant to the deci-

sion in the 1947 transfer case. The certificate was not to become effective until March 19, 1948, about a month and a half after the date of issuance and contained the same provisions as the 1944 certificate with respect to types of equipment and service (R. 57, 58). Neither appellant nor any one else objected to this certificate before its effective date or within the time provided for in the Commission's rules.

(4) Following complaint by Cornell to the Commission that appellant was performing unauthorized towage, a representative of the Commission on September 19, 1950, called appellant's attention to the decision by Division 4 in *Dixie Carriers, Inc., Rates & Allowances*, 278 I.C.C. 417, indicating that appellant's service appeared to be unlawful (R. 28). Appellant replied "on September 25, 1950, that it would be its purpose to conduct its operations in conformity with the determination in the *Dixie case* when the order therein became effective" (R. 28). In that case there was no question of revocation or as to the Commission's power to specify types of equipment or services. Appellant in expressing its willingness to be bound by the final decision in that case indicated in effect that it had no complaint such as the contentions now made, as to alleged absence of authority in the Commission to issue the 1944 Hutton certificate and to specify types of equipment and services.

(5) Although indicating that it would conform to the decision in the *Dixie Carriers case* when it should become effective, appellant did not do so but following the effective date of that decision on December 26, 1950, filed a petition with the Commission on January 5, 1951, for interpretation, such petition with the complaint being the basis for the present decision (R. 28, 29). There is no suggestion that the petition contained any claim or contention that the Commission had, without authority, revoked the 1942 Hutton certificate or that there was unauthorized specification of types of equipment or services.

(6) The admissions by counsel for appellant at the hearing before the Commission on February 23, 1951, that its

certificate did not include the right to perform towage have been referred to (I.C.C. tr. pp. 9, 10)*. There was no suggestion that appellant's certificate was improper or invalid in any respect.

(7) In the original brief by appellant, dated April 13, 1951, there is no contention that appellant's certificate is invalid in any respect. The contention was that "the only question for determination in this proceeding is whether or not the Callanan Company has exceeded the authority of its certificate and the answer to that question must be found in the language of the certificate and not elsewhere" (Original (I.C.C.) brief, p. 18).*

(8) Not until the filing of its exceptions brief on June 18, 1951, following an adverse report of the hearing examiner did appellant make the contention that its certificate was invalid to the extent that it contained any specification of the service to be rendered by the water carrier or that there was unauthorized revocation (Exceptions brief, p. 22).*

(9) On July 20, 1951, appellant filed with the Commission another petition making the point that the Hutton certificate of 1944 constituted an unauthorized revocation of the original 1942 certificate. Following a reply by Cornell challenging the contention as made too late and as otherwise without merit the Commission denied the petition by order, dated July 7, 1952.* No petition for reconsideration of this order has been filed by appellant.

Fatal "lack of diligence". The circumstances set forth above unmistakably show the inequitable character of appellant's last-minute attempts, by legal technicalities, in themselves unsound, to escape the just limitations in its certificate, which grants it authority to perform a freighting service of general commodities and not a towage service.

Not until 7 years after the 1944 Hutton certificate became effective, not until 4 years after the order in the *transfer*

* These documents are not printed but may be referred to by either party under the stipulation (R. 79).

case, and not until 3 years after the 1948 certificate to appellant, were the contentions here under consideration made.

As above indicated there was utterly lacking any attempt to challenge the validity of these certificates within the time provided in the Commission's rules. No other conclusion is permissible than that appellant consented to these certificates and the provisions thereof. Such consent is referred to by the Commission in the report here in issue (R. 26), and distinguishes the *Seatrain case*, 329 U.S. 424, supra, in which there was no consent but vigorous and timely objection. That case will be referred to more in detail later.

In *United States* v. *Northern Pacific Ry.*, 288 U.S. 490 (1933), this Court ruled that there was a fatal "lack of diligence" under conditions less compelling than in the present case. There in an attack on an order of the Commission prescribing rates on petroleum its action was upheld in declining to reopen the proceeding to admit evidence of changed economic conditions. The Court said (p. 494):

> "Though the order substantially reduced the carriers' revenues, we do not consider the merits of the application for rehearing, as we think the carriers' lack of diligence in bringing this matter to the Commission's attention deprive them of any equity to complain of the refusal of their petition. They sat silent and took the chance of a favorable decision on the record as made. They should not be permitted to reopen the case for the introduction of evidence long available and susceptible of production months before the Commission acted. The denial of a rehearing, in view of this delay, was not such an abuse of discretion as would warrant setting aside the order".

In the recent case of *United States* v. *L. A. Tucker Truck Lines*, 73 S. Ct. 67 (1952), the failure to make timely objection was found to be fatal. Although in that case the question, which concerned the validity of a proceeding before the Commission in which the hearing was by an

examiner who had not qualified under section 11 of the Administrative Procedure Act, and the question had first been raised in Court and not before the Commission, the injustice and inequity of such belated attempt to upset the Commission's order were condemned, in the face of a contention that there was a lack of "jurisdiction" on the part of the Commission to make its decision. In the present case the question as to the validity of the Hutton and Callanan certificates was not raised before the Commission until years after such certificates had become final and the period for reconsideration under the Commission's rules had expired. The tardiness of the claim before the Commission is entitled to the same adverse ruling as the late presentation of the hearing examiner question in Court in the *Tucker case*. The following language in that case appears particularly apt here (p. 68):

> "The issue is clearly an afterthought, brought forward at the last possible moment to undo the administrative proceedings without consideration of the merits and can prevail only from technical compulsion irrespective of consideration of practical justice";

Again the Court said (p. 69):

> "Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice".

In the present case no such objection was made within the time provided under the Commission's Rules of Practice and in addition there was no reason as a matter of "practical justice" why the certificates which actually gave the carrier all it was entitled to receive under the "grandfather" provisions of the Act, should be invalidated in whole or in part. Appellant's contentions are too late and should be rejected.

IV. BESIDES BEING MADE TOO LATE, APPELLANT'S CONTENTION THAT THE COMMISSION IS AUTOMATICALLY BARRED FROM SPECIFYING IN CERTIFICATES THE GENERAL TYPES OF EQUIPMENT AND THE SERVICES TO BE PERFORMED IS ERRONEOUS AND IS AN UNJUSTIFIED ATTEMPT TO TEAR DOWN A LONG-ESTABLISHED SYSTEM OF WATER CARRIER REGULATION.

(a) Appellant's contention runs counter to the fundamental purposes of the "grandfather" provisions of the Act.

While there are some differences in the language of the convenience and necessity provisions of the Interstate Commerce Act applicable to railroads, motor carriers, and water carriers, there can be no doubt that the fundamental purposes are the same.

Where "grandfather" rights are to be preserved there must be a showing of "substantial parity between future operations and prior bona fide operations". *Alton R. Co.* v. *United States*, 315 U.S. 15 (1942), a motor carrier case. "When Congress provided for certificates to cover all carriers which were already in operation, it did not throw open the motor transportation system to more destructive competition than that already existing". *Crescent Express Lines* v. *United States*, 320 U.S. 401, 409 (1943), a motor carrier case. "The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority". *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945), a water carrier case. In the last mentioned case *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, is cited in support of the statement just quoted. That case was under the motor carrier provisions of the Act and reference to it, as previously pointed out, indicates the

similar purpose applicable to both water carriers and motor carriers.

Underlying the convenience and necessity provisions of the Act, as to all carriers, is the purpose to prevent unnecessary duplications of facilities and services, with resulting injury to existing carriers, and ultimately to the public. *Texas & P. Ry. Co.* v. *Gulf, C. & S. F. Ry. Co.*, 270 U.S. 266, 277 (1926), a railroad case, *McLean Trucking Co.* v. *United States*, 321 U.S. 67, footnote 17 (1944), a motor carrier case and *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945), supra, a water carrier case.

In the recent decision in *American Trucking Ass'ns.* v. *United States*, 73 S. Ct. 307 (January 12, 1953) the Court in upholding broad discretionary powers in the Commission with respect to rules concerning the leasing of motor vehicles said (p. 316):

> "So Congress felt compelled to require authorization for all interstate operations to preserve the motor transportation system from over-competition, while at the same time protecting existing routes through the 'grandfather' clause".

A similar purpose underlies the water carrier provisions of the Act. See also the cases referred to in part I of this brief.

(b) Appellant's contention misconceives the broad powers of the Commission under sections 309 and 304 of the Act.

The Commission has made plain that its authority under the statutes to specify types of equipment and service in certificates granted is to be found in the convenience and necessity provisions of section 309 of the Act, read in connection with section 304(c) of the Act, as to classification of carriers.

In the report here under consideration the Commission referred to its previous decision *Norfolk, Baltimore and*

Carolina Line, Inc., Ext.—James R., 265 I.C.C. 247, 253-4, affirmed, as to this matter, by the entire Commission, 265 I.C.C. 313, 314, which sets forth in some detail the reasons for specification of types of equipment and services in certificates issued, the statutory authority for such action, and the long and uniform practice of limiting operating rights in accordance with the type of vessels to be operated.

In the *Norfolk, Baltimore and Carolina case*, the Commission said (p. 254):

> "The Commission's authority to specify the type of vessels to be used is contained in sections 304(c) and 309(d) of the act. Section 304(c) provides that the Commission may establish such just and reasonable classifications of water carriers as the special nature of the service performed by such carriers shall require; and section 309(d) provides that there shall be attached to the exercise of the privileges granted by a certificate such reasonable terms, conditions, and limitations, as the public convenience and necessity may from time to time require. In the exercise of this authority the Commission uniformly has classified water carriers and limited their operating rights in accordance with the type of vessels to be operated. *Erie & St. Lawrence Corp. Contract Carrier Application*, 250 I.C.C. 767, 780, and the Commission's report on reconsideration therein, 260 I.C.C. 235, 237-238".

Then referring to an earlier case on the subject the Commission said (254):

> "The reasons for the classification of carriers as to type of vessels used are stated in *A. L. Mechling Barge Line Common Carrier Application*, 250 I.C.C. 77, wherein Division 4 said:
>
> > 'Applicant furnishes transportation by barge, and we will limit his service to that type of operation. Classification of carriers in terms of this type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which

> they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights of water carriers subject to part III of the act.'
>
> See also *Isthmian S. S. Co. Common Carrier Application*, 250 I.C.C. 735."

The *Mechling case*, decided in 1941, was among the first decisions under the water carrier provision of the Act.

In the *Norfolk, Baltimore and Carolina case* the contention was made that the Court in the *Seatrain case*, 329 U.S. 424, had raised doubt as to whether the Commission could impose a restriction "as to the type of service a water carrier could utilize to serve its shippers". The Court, however, was not called upon to decide, and did not decide, that the Commission had no such authority under such circumstances as those in this case. Referring to that case the Commission said in the *Norfolk, Baltimore and Carolina case*, (p. 254):

> "*United States* v. *Seatrain Lines*, 329 U.S. 424, relied upon by the applicant in opposition to these precedents, presented the issue of whether the Commission could alter Seatrain's certificate, which had become effective, and did not decide the question of whether the Commission could specify the type of vessels to be used in an original certificate".

The authority of the Commission, under the provisions of the statute above referred to, to specify types of equipment and services, as in the present case, is not only supported by the Commission's decisions but by decisions of the Courts.

The District Court in the present case carefully analyzes the contentions made by Callanan on this phase of the case and concludes that the Commission has ample authority to specify the type of equipment and the service to be rendered, as here in question (R. 65-70).

The Supreme Court in *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236 (1945), supra, upheld a certificate issued by the Commission to a water carrier specifying operation "by water of motor vehicles by self-propelled vessels". There was thus a restriction on the type of traffic (motor vehicles) that could be carried and also on the type of vessel which could carry such traffic.

In *Inland Nav. Co.* v. *United States*, 76 F. Supp. 567 (1948) a Three-Judge Statutory Court sustained a certificate of the Commission issued to a water carrier (260 I.C.C. 30) authorizing it under the "grandfather" clause to operate by water "by non-self-propelled vessels with the use of separate towing vessels in the transportation of commodities generally" and "by towing vessels in the performance of general towage" between various points described in the certificate. There was thus authorized a freighting service and a towage service, while in the present case only freighting service was authorized. The Court laid considerable emphasis on the broad discretion conferred upon the Commission in administering the water carrier provisions of the Act.

In *Warner* v. *United States*, 341 U.S. 907 (1951), this Court affirmed on motion the decision of the lower Court (97 F. Supp. 580) upholding authority of the Commission to restrict a contract carrier by water as to "freighting" services, "towage" services, and chartering. The decision was under the permit provisions of section 309 applicable to contract carriers but the underlying purpose is the same as in the certificate provisions of that section.

It is true that in the *Detroit & Cleveland Navigation Company case*, the *Inland Navigation Co. case* and the *Warner case*, there was no discussion of the Commission's authority to specify types of equipment or services, but the fact is that the authority granted by the Commission in each case was subject to such specification. It is not difficult to infer that the question here raised was not brought forth in those

cases, because it was not considered to be of sufficient merit to justify judicial consideration.

The proviso against limitation of additions to equipment, facilities, or services does not deprive the Commission of authority to specify types of equipment and services. In the *Norfolk, Baltimore and Carolina Line case,* 265 I.C.C. 247, cited in the report here in issue the Commission pointed out that while the proviso in section 309(d) prohibits restrictions in a certificate on "the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate," this does not prevent a specification of types of equipment or services in the scope of such certificate. It said (p. 254):

> "This proviso does not prohibit the Commission from specifying the type of vessels to be used by a certificate holder. Rather, it is a prohibition against the imposition of any term, condition, or limitation designed as a restriction against the carrier's increasing the amount of its equipment, facilities, or service."

If, for example, a carrier is limited in its certificate to the transportation of "passengers" in "self-propelled vessels", it can, consistently with this proviso, increase its service by increasing the number of passenger schedules operated and can increase the number of self-propelled vessels used in rendering such service. These are increases "within the scope" of the carrier's authority. This does not mean, however, that the carrier could embark upon a service outside and beyond the scope of its certificate, as for example, in the carrying not of *passengers* but of *freight* or in the transportation not by "self-propelled vessels" but by "non-self-propelled vessels with the use of separate towing vessels".

In the present case, as previously pointed out, there is a clear recognition of the distinction between freighting, namely, transportation by self-propelled vessels or by non-self-propelled vessels with the use of separate towing ves-

sels, and of towage, namely, by towing vessels in the performance of general towage, and the certificate provides for freighting service only. That carrier, it is to be noted, is not restricted in any way as to the number or size of vessels it may use, the horsepower that may be employed, or the materials of vessel construction. The specification is a broad, general one "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels" and the carrier may transport "commodities generally".

Appellant under the proviso can add to its service of freighting by increasing the amount of such service and by increasing the number of self-propelled vessels used or the number of non-self-propelled vessels with separate towing vessels. But the proviso is no warrant for breaking through the scope of the general authority of freighting, and invading the field of towing, as is here attempted.

Cornell Steamboat Company is restricted to towing. It can, of course, add to its towing service and increase the number of its towing vessels, but it cannot enter into a service beyond the "scope" of its certificate and engage in freighting service. It would be cruelly unjust to allow Callanan to disregard the scope of its certificate and invade the towage field, to the severe injury of Cornell, which is restricted to towage.

(c) Appellant unjustly attempts to uproot the long-established and uniform practice of the Commission.

The numerous cases in which the Commission has specified in certificates granted by it types of equipment and services of water carriers have been referred to above. The distinction between freighting and towage has been made and types of traffic authorized to be carried have been specified. From the general absence of complaint, it may reasonably be said that the Commission's interpretation of the statute has met with general approval by the water carrier industry, by shippers, and by the public at large.

In the *Norfolk, Baltimore & Carolina case, supra,* the Commission pointed out that under the statute it "uniformly has classified water carriers and limited their operating rights in accordance with the type of vessels to be operated" (p. 254). It would require clear and compelling reasons to disrupt this practice and invalidate the limitations contained in nearly every certificate which has been granted by the Commission. Appellant's reasoning erroneously leads to such a result.

It is to be remembered that this Court said in *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 549 (1940) that the Commission's interpretations of the Act "are entitled to great weight," and that this "is peculiarly true" "where the interpretations involve 'contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new' ".

The Commission acting under the water carrier provisions has made the Act work and has carried out the purpose of Congress.

(d) Appellant's reliance upon the Seatrain case is based upon a misconception and distorted view of that case.

While appellant seems to place great reliance on the *Seatrain case,* 329 U.S. 424, this case is in no way controlling here. The District Court, after careful analysis, reached this conclusion and shows that its opinion rests on solid ground (R. 67-70).

As distinguishing the *Seatrain case* from the present case, the following, among other circumstances should be considered:

(1) The "equities" are entirely different in the two cases. In the *Seatrain case,* as the lower Court points out, the Commission sought by the amended certificate to curtail severely the service which the Supreme Court said that that carrier had shown itself entitled to perform under the

"grandfather" clause and under the convenience and necessity provisions as to authorization of new service. The restriction, it was pointed out, amounted almost to a limitation of the carrier to a merely car ferry service handling railroad cars between railroads, although its service had included port to port traffic originating or delivered by truck or otherwise and not confined to interchange with railroads, and there was evidence of transportation of general commodities.

In contrast with the curtailed rights in the *Seatrain case*, the rights which were granted to Hutton and transferred to appellant were rights to perform a freighting service, which was the only service performed in the "grandfather" period and the only service as to which it was entitled to a certificate.

(2) In the *Seatrain case*, there was no consent to the amended certificate, but it was promptly objected to and complained of. The opposite is true in the present case. In parts II and III of this brief, it is shown that neither Hutton, appellant's predecessor, nor appellant made any objection to the 1944 amendment, to the transfer in 1947, or to the certificate to appellant in 1948, within the time provided for in the Commission's rules. In fact the circumstances indicated not only consent but insistence upon the terms of the certificate.

(3) A fundamental difference is that in the *Seatrain case* there was no later proceeding involving transfer of the rights in question and calling for independent judgment, while in the present case there was such independent later proceeding in which, irrespective of the change made in 1944, the Commission had full authority to retain the terms and conditions in the certificate as in the public interest.

In the *Seatrain case*, the amended certificate complained of was issued after the original certificate had become final. In the present case, aside from the consent by Hutton to the 1944 certificate and the consent by his administratrix and appellant to the terms of that certificate as authorized to be transferred in the 1947 proceeding,

there was no certificate finally issued to Callanan until 1948 and prior to this final act the Commission could impose terms and conditions as to the transfer and specify the service and type of equipment in the order thus issued. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951). There was no question in the *Seatrain case* of a late transfer of the amended certificate complained of. Certainly in the present case, aside from other reasons, the transfer proceeding gave the Commission full opportunity properly to impose conditions and specify terms, and thus avoid the harsh injustice of permitting appellant to perform a service, namely towage, which it had failed to show that it was entitled to perform under the "grandfather" clause.

(4) While the Court in the *Seatrain case* said that section 309(d) contains no express reference to specification of service and that there is such reference in the corresponding provisions applicable to motor carriers, this, it is believed, does not have the significance which appellant claims. Under section 309(d) the Commission is expressly authorized to "specify the route or routes over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require * * *" subject to a proviso against restricting "the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate".

While literally the language at the beginning of the quotation refers merely to a specification of "the route or routes over which or the ports," the remaining language and other provisions of the same section show a broader authority is provided. The literal interpretation would appear clearly unreasonable in barring the Commission, for example, from denying a carrier authority to perform *passenger* operation by self-propelled vessels under the

"grandfather" clause when its only past operation in the "grandfather" period had been in the transportation of *property* in non-self-propelled vessels with the use of separate towing vessels. A search as to the legislative history of this section fails to disclose any statement that the difference in language between the section and the motor carrier section was intended to exclude authority to specify equipment and service.

It is to be noted further that under the "grandfather" clause (section 309(a)) the later service must be "so operated" as on "grandfather" date. Moreover, there is provision as to furnishing "seasonal service" and as to operations of the "character in question," together with a provision as to the effect of interruption of "service". Also in section 309(c) the Commission is empowered, as to new services proposed, to authorize the "whole or any part" of the operations covered by the application if it finds, among other things, that the carrier is qualified to perform "the service" proposed and that the "proposed service, to the extent authorized by the certificate" is required by public convenience and necessity. These provisions indicate a clear intention to vest the Commission with authority to deal with "service" in granting certificates. The proviso in section 309(d) as to addition of service indicates that the general rule is to include service. The provision in section 309(d) as to the imposition of "reasonable terms, conditions, and limitations" further indicates the broad authority conferred on the Commission.

As previously pointed out, this section is to be read in connection with section 304(c), which authorizes the Commission to establish reasonable classification of groups of carriers. The related provisions of section 311 as to application for temporary authority to provide "service" for which there is an urgent need, further indicate the intent of Congress to deal with "service" under section 309, since temporary authority is usually the forerunner of a request for permanent authority. In the *Seatrain case* there is no mention of the carrier-classification provisions of section

304, the provisions of section 309(a) and (c) or the temporary authority provisions, referred to above.

(5) In the *Seatrain case* while the certificate complained of was set aside, the original certificate which was left in operation provided for service by "self-propelled vessels". It also limited the carrier to transportation of commodities and thus excluded authority to transport passengers.

(6) In the *Seatrain case*, there is is no authority for the contention that the proviso prohibiting restriction of "the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require" (section 309(d)) prevents the Commission's action in the present case. The certificate granted in the present case does not limit the size, horsepower, or material of equipment construction, or otherwise deal with details of operation. Appellant under the proviso of section 309(d) may increase the amount of the service authorized, namely freighting, and the number of vessels to be used in the service. Such additions are permitted as within the "scope of the certificate."

The *Seatrain case* furnishes no justification for appellant's contention here as to alleged unauthorized revocation of the 1942 certificate and unauthorized specification of types of equipment or services.

V. APPELLANT'S CONTENTION AS TO ALLEGED UNAUTHORIZED REVOCATION OF THE CERTIFICATE OF JULY 17, 1942, TO HUTTON IS WITHOUT MERIT.

In view of what has previously been pointed out in parts II, III and IV of this brief, little more need be said in dealing with appellant's claim of unauthorized revocation of the 1942 Hutton certificate, which contained no reference to types of equipment that could be used.

The 1944 Hutton certificate cancelled the 1942 certificate, and as previously explained, added the specification that

the transportation of commodities should be by "self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels". This certificate patterned the authority in accordance with the service (freighting) which Hutton actually performed in the critical "grandfather" period and as to which, and not towage, he was entitled to a certificate under the "grandfather" clause. Although the certificate was not to become effective until two and a half months after it, and the report accompanying it, were issued (R. 11-14), no objection was made by Hutton within this time or within the 30-day period provided for in the Commission's rules for petitions for reconsideration in such cases. In fact, as previously pointed out, neither Hutton nor his administratrix ever made any objection, and the question was not raised by appellant until seven years later as a patent afterthought in the present proceeding.

Aside from the fact that the 1944 Hutton certificate was a clarifying amendment of the 1942 Hutton certificate and gave the carrier all it was entitled to under the "grandfather" provisions of the Act, it cannot properly be said that there has been an unauthorized revocation, in view of the following three reasons, any one of which is fatal to appellant's claim:

(a) **The 1944 Hutton certificate.** Although as above pointed out, ample time was provided under the Commission's rules for objecting to or contesting the 1944 Hutton amendment, this was not done, and the attempt to do so seven years thereafter is too late. The petition of appellant to restore the Hutton 1942 certificate was filed on July 20, 1951, and was denied by order of the Commission, dated July 7, 1952.* Appellant has not filed a petition for reconsideration of that order and has not filed complaint in Court against such order. The Commission in its report in the present case has pointed out that consent by the carrier bars the claim of unauthorized revocation and distinguishes the case from the *Seatrain case*, 329 U.S. 424 (R. 26).

* These documents have not been printed but are subject to the stipulation as to their use (R. 79).

(b) **The 1947 transfer proceeding.** In that proceeding appellant, for a purchase price of only $2,750, sought to have the Commission authorize transfer to it of the rights under the Hutton certificate of March 7, 1944 (not the 1942 certificate). The application was under section 312 of the Act and the regulations made pursuant thereto.**

Under these regulations approval by the Commission was permissible only "upon a showing," among other things, that "the water carrier operations authorized under the certificate sought to be transferred will be consistent with the public interest".

The Commission thus had the power in the *Transfer case*, in passing upon consistency with the public interest, to authorize transfer of all or only a part of the operating rights sought to be purchased. Therefore, as an original and independent exercise of authority, it could determine whether in the public interest the type of equipment and service should be specified. Certainly, in view of the "grandfather" showing, the authorization of towage would not have been consistent with the public interest. The Commission was thus justified in authorizing transfer of the rights under the 1944 certificate to appellant under the terms of that certificate. Its report and order, dated August 18, 1947, were not contested.

It is to be noted that the rights authorized to be transferred did not include those which had been authorized in the 1944 certificate on the New York State Barge Canal. If appellant were now to disclaim its consent to the elimination of the New York State Barge Canal rights from the certificate in the *Transfer case* this would seem to be a shocking proposition. The contention here made by appel-

** Under these regulations (title 49 part 306) provision is made for the filing of information with the Commission and for the issuance of "an appropriate certificate" "superseding the certificate * * * transferred" (sec. 306.6). The rules further provide, among other things (sec. 306.9): "The transfer of any certificate or permit under which operations are not being conducted at the time of the proposed transfer will be approved only upon a showing that the suspension of operations was caused by circumstances over which the holder of the certificate or permit had no control, and that the water carrier operations authorized under the certificate sought to be transferred will be consistent with the public interest".

lant, in the light of its request for transfer of the 1944 rights, of its insistence then that the certificate could not be attacked, and its consent thereto, appears to be equally shocking.

The *Transfer case* is thus a second and independent reason why appellant's claim of unauthorized revocation is unsound.

(c) **The 1948 certificate, the first and only one issued to appellant.** Pursuant to the decision in the *Transfer case* the Commission issued a certificate to appellant, dated February 5, 1948, but not to become effective until March 19, 1948. There was no objection to this certificate within the time provided therein or in the rules of the Commission. The contention as to alleged revocation, therefore, comes too late.

In addition, it is believed that since the 1948 certificate represented "the final act or order" authorizing operation by appellant, the Commission up to that point, irrespective of its action in 1944, had full authority to approve the specification of equipment or service which was included in that certificate and which carried forward the provisions of the 1944 Hutton certificate.

This conclusion appears to be sustained by the decision in *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951) where the Commission was upheld in restricting operating rights purchased by a railroad-owned motor carrier transferee, on the ground that until "the final act or order" validating the operation by issuance of a certificate to the transferee, the Commission had full authority to frame the certificate (p. 448).

That the *Seatrain case*, *supra*, does not sustain appellant's contention is pointed out in part IV of this brief, p. 46.

Its claim is based on last minute technicalities and is utterly without merit.

VI. APPELLANT'S CONTENTION THAT THE COMMISSION'S ORDER CONSTITUTES A REVOCATION OR MODIFICATION OF SECTION 314 AUTHORIZING ALLOWANCES UNDER THE ACT IS ERRONEOUS.

The basic fallacy in appellant's contention that the allowance provisions of section 314 of the Act are not complied with by the Commission in this case arises from its failure to recognize that allowances cannot properly be paid by a carrier in respect to services which it is not authorized to perform. In the present case the Commission has found, and the District Court has sustained it in finding, that it is not authorized under its certificate to perform towage, that the service actually performed under the allowance tariff is towage, that the payment of allowance in respect to such unauthorized services is unlawful and is properly forbidden by the Commission in the order here in issue.

In numerous cases involving the question of allowances by railroads to shippers for switching service in their plants, on the theory that such service is included under the line-haul rates, allowances have been condemned where it was found that the service performed by the shipper was beyond the transportation found to be authorized under the line-haul rates. The Commission has been sustained by this Court in a number of such cases appealed to it. In *United States* v. *American Sheet & Tin Plate Co.*, 301 U.S. 402, for example, the Court emphasized the discretionary duties of the Commission in determining where the transportation ended under the line-haul rates and sustained the Commission in finding "that the carriers' service of transportation is complete upon delivery to the industries' interchange tracks, and that spotting within the plants is not included in the service for which the line-haul rates were fixed." The Commission was, therefore, held to have "power to enjoin the performance of that additional service or the making of an allowance to the industry which performs it" (p. 408).

Appellant in relying upon *Interstate Com. Com.* v. *Diffenbaugh*, 222 U.S. 42 (1911), fails to recognize that that case makes plain that an allowance may be paid only in connection with a service the carrier itself is authorized to perform. This appears from the statement in the opinion "As the carrier is *required to furnish this part of the transportation* upon request, he could not be required to do it at his own expense, and there is nothing to prevent his hiring the instrumentality instead of owning it" (Italics supplied). Moreover, in the forty years since that case was decided the importance of upholding the exercise of the Commission's discretionary powers has been emphasized. In *General American Tank Car Corp.* v. *El Dorado T. Co.*, 308 U.S. 422 (1940), the Court in dealing with certain allowance practices in respect to private tank cars said (p. 432) "that the question of the reasonableness and legality of the practices of the parties was subjected by the Interstate Commerce Act to the administrative authority of the Interstate Commerce Commission". In a later stage of the case (328 U.S. 12 (1946)), the Court said that the question as to whether the "allowances and practices" were lawful and reasonable were "administrative problems calling for investigation and determination by the Commission" (p. 17).

The importance of upholding the Commission in the exercise of discretion conferred upon it and the heavy burden upon the one seeking to set aside the Commission's action are referred to in part I of this brief and no good purpose would be served by repeating what was there said.

The service here in question is found by the Commission to be unauthorized towage and allowances in respect thereto are, therefore, unlawful. The Commission in its report (R. 22) describes appellant's operations in considerable detail. It shows that appellant is engaged in the production of crushed stone and transports this commodity in its vessels. It said "In the same tows in which the crushed stone is transported it operates as a carrier for hire in the movement of brick loaded on its deck scows or chartered scows, and on scows of the shippers for which it makes allowances

in accordance with its tariff I.C.C. No. 2" (R. 28).

Referring to the rates published by appellant the Commission said (R. 29):

> "These rates do not include insurance. The same rates also apply on the movement of brick in scows furnished by shippers, for which so-called allowances are made and the demurrage rules are inapplicable. When the petitioner is not required to return the shipper's scow light to point of origin, a 'credit' or additional allowance is made. [Rate examples are then given] The credit varies with the distance the scow is towed light. While the petitioner's rates in connection with the movement of brick have been reduced twice, the allowances or credits have remained unchanged".

The Commission found that while appellant published its tariff on April 17, 1949, and provided for net rates, after deduction of allowances, equal to the towage rates of Cornell it was unable to divert brick traffic from the latter until after appellant reduced its rates on March 26, 1950. It then diverted a large amount of traffic (R. 29, 30).

Describing the manner in which the brick traffic was handled by appellant under the allowance tariff the Commission said (R. 31):

> "No bills of lading or shipping orders were or are issued by the petitioner in connection with the transportation of the shippers' scows loaded with brick. Nor are there any written agreements between the parties bearing on the use of such scows by the petitioner. Under the arrangements by which the scows are used the petitioner may not transport thereon the property of any shipper other than the one furnishing the vessel. More specifically, the petitioner may not load cargo on a shipper's scow for the return movement up the Hudson River after a shipment of brick has been discharged in New York Harbor".

After distinguishing transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels (freighting) from towing services, including

reference to the *Dixie Carriers case*, 278 I.C.C, 417, and the *Campbell Transportation Co. case*, 260 I.C.C. 107 (R. 31, 32), the Commission said (R. 32):

> "Petitioner's rates applicable to the movement of brick from up-river points to New York Harbor provide for the return of shippers' scows light to points of origin, and as hereinbefore stated, its published rules with respect to free time and demurrage are inapplicable when scows are furnished by shippers. In addition, petitioner admits that it may not load a shipper's scow at New York for an up-stream movement in lieu of returning the vessel light to its owner at origin. The fact that a charge is made for return of the empty scow to point of origin indicates that its original tender to the carrier was as a part of the consignment to be towed. From these facts the conclusion is inescapable that the petitioner does not and may not utilize shippers' scows as a part of its own equipment, from which it follows that the transportation performed by the petitioner in connection with the movement of freight in shippers' scows constitutes a towage service".

The Commission had earlier called attention to the fact that "The shippers' scows are furnished with a captain on board who is responsible to the shipper or owner of the scow and is paid by him". (R. 28), that "These rates do not include insurance" (R. 29), and that there are no "written agreements between the parties bearing on the use of such scows" by the appellant (R. 31).

Upon the facts thus found the Commission concluded that appellant "has been and is performing the service of towage without appropriate authority therefor" and that "the rates, charges, and allowances in its tariff I.C.C. No. 2, to the extent that they cover such service as is herein found to be towage, are published without authority, and therefore are unlawful" (R. 32).

These findings are well within the administrative discretion of the Commission, are in accordance with decisions of this Court, and are not subject to being disturbed or reversed on judicial review. Clearly there is no ground for

any contention of arbitrary or capricious action by the Commission or absence of evidence to sustain its finding.

The Commission's conclusions are not only sound but are amply sustained by previous decisions, including the *Dixie Carriers case*, 278 I.C.C. 418, *supra*, *Union Barge Line Corp. case*, 260 I.C.C. 563, and *Campbell Trans. Company case*, 260 I.C.C. 107.

It is to be noted that in the railroad industry, in which to some extent allowances are made for private cars, there are no corresponding categories such as freighting and towage, as in the water carrier industry, and regulations as to allowances may, therefore, differ. The distinction in the water carrier industry, however, is important and the Commission is acting in the public interest in protecting towage rights from unauthorized invasion by a carrier limited to freighting rights.

Appellant apparently contends that equipment "leased" from a shipper although a part of the carrier's facilities in freight service would not be under the allowance provision of the Act and that this is evidence of unreasonableness of the Commission's findings in the present case. This, however, is a misconception of the allowance provisions. See, for example, *Payment for Leased Motor Vehicles on Cotton*, 276 I.C.C. 675, a case involving allowances for lease of motor vehicles.

The Commission's findings are just and proper and should be sustained. They have been approved by the entire Commission, and by the District Court.

VII. APPELLANT'S CLAIM THAT THE COMMISSION HAS FAILED TO COMPLY WITH THE PROVISIONS OF SECTION 8(b) OF THE ADMINISTRATIVE PROCEDURE ACT IS UTTERLY WITHOUT SUBSTANCE AND IS FRIVOLOUS IN CHARACTER.

Neither in the exceptions to the proposed report of the examiner nor in the petition for reconsideration of the Division's decision by the entire Commission did appellant make any contention as to section 8(b) of the Administrative Procedure Act. Such failure is fatal to the contention here made. *United States* v. *Hancock Truck Lines*, 324 U.S. 774 (1945); *General Transp. Co.* v. *United States*, D.C.D. Mass., 65 F. Supp. 981, affirmed *per curiam* 1946, 329 U.S. 668, rehearing denied 1946, 329 U.S. 827, and *United States* v. *L. A. Tucker Truck Lines*, 73 S. Ct. 67 (1952).

The District Court in overruling this contention states that "this objection seems to border on the frivolous" (R. 70).

Appellant apparently admits that findings have been made as to the question of towage or freighting but complains that the Commission's report does not deal adequately with its contentions as to alleged revocation and as to alleged absence of authority in the Commission to specify types of equipment and services. The Commission points out the basic error as to the first contention in that appellant's certificate has been consented to and that the situation is, therefore, different from that in the *Seatrain case, supra* (R. 26). As to the other contention it called attention to the *Norfolk, Baltimore and Carolina case*, 265 I.C.C. 247, in which authority to specify types of equipment and services are fully discussed and explained (R. 25). Moreover, there is nothing to show that appellant submitted proposed findings to the Commission under section 8(b).

Atlanta & St. Andrews Bay Ry. Co. v. *United States*, 104 F. Supp. 193 (1952) relied upon by appellant was a petroleum rate case having no factual similarity to the present case. The underlying findings were held to be contrary to the ultimate findings (p. 201). The District Court in the

present case referred to the findings as "entirely adequate and complete, indeed praise-worthily so" (R. 71), and they are well within the principles established by this Court in numerous cases. See *Inland Navigation Co.* v. *United States*, 76 F. Supp. 567 (1948), and cases cited therein.

Appellant's contention is devoid of merit.

CONCLUSION.

Appellant's case, it is believed, rests on legalistic technicalities and claims made too late in equity. It unjustly seeks to expand rights granted to it in a certificate by the Commission to include services which it is not authorized to perform and the performance of which has resulted and will result in severe injury to appellee, Cornell Steamboat Company.

For the reasons set forth above, it is respectfully submitted that the decision of the lower Court should be affirmed.

Respectfully submitted,

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MARCH 31, 1953.

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No. 488

In the Supreme Court of the United States

OCTOBER TERM, 1952

THE CALLANAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CORNELL STEAMBOAT COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY, A CORPORATION, SOUTH BETHLEHEM, NEW YORK, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CORNELL STEAMBOAT COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the District Court for the Northern District of New York (R. 59) is reported in 107 F. Supp. 184. The report of the Interstate Commerce Commission (R. 22) appears in 285 I. C. C. 75.

JURISDICTION

The final decree of the three-judge district court was entered on September 15, 1952 (R. 71).

The petition for appeal was presented and allowed on November 7, 1952 (R. 71, 74). The jurisdiction of this Court is conferred by 28 U. S. C. 1253, 2101 (b), and 2325. Probable jurisdiction was noted on February 2, 1953 (R. 80).

QUESTIONS PRESENTED

In our view, the questions presented are:

1. Whether, in issuing certificates of public convenience and necessity to water carriers pursuant to Part III of the Interstate Commerce Act, the Interstate Commerce Commission may specify the service to be rendered.

2. Whether appellant's certificate authorizes it to perform the service known as towage, or limits it to the service known as freightage.

3. Whether the Commission properly found that the service covered by the tariffs which it ordered cancelled constituted towage.

STATUTE INVOLVED

The relevant provisions of the Interstate Commerce Act are set forth in the Appendix, *infra*, pp. 45–48.

STATEMENT

This is a direct appeal from the judgment of a three-judge district court dismissing a suit to enjoin enforcement of an order of the Interstate Commerce Commission. The order in question required appellant, a common carrier by water, to cancel certain rates which it had published,

undertaking to grant allowances or deductions from its established rates for the transportation of bricks when the vessel used in such transportation was furnished by the shipper. The Commission found that the service rendered by appellant pursuant to such rates was towing, a service which appellant was not authorized to perform under the terms of its certificate.

Appellant's certificate of public convenience and necessity authorizes it to operate as a common carrier by water "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels" in the transportation of commodities generally on the Hudson River between Waterford, New York, and New York City (R. 56–57). Appellant acquired its certificate by purchase from the estate of Joseph R. Hutton in 1948 (R. 21–22).

Hutton's original certificate, issued on July 17, 1942, in "grandfather" proceedings under Section 309 of the Interstate Commerce Act,[1] authorized him to transport commodities generally as a common carrier on the Hudson River and other waterways in New York State (R. 9–10; *Hutton Contract Carrier Application*, 250 I. C. C. 804). The Commission subsequently reopened the

[1] Section 309 provides that, as to operations conducted by common carriers by water on January 1, 1940, the Commission shall issue a certificate covering such operations "without requiring further proof that public convenience and necessity will be served by such operation * * *"

proceedings on its own motion (R. 11), and on March 7, 1944, cancelled the prior certificate and issued an amended one in its place (R. 14). The amended certificate authorized operations in the same territory as the original one, but stated that Hutton's service was to be performed by "self-propelled vessels" and "non-self-propelled vessels with the use of separate towing vessels" (R. 13). The Commission found that on January 1, 1940—the critical date under the "grandfather" clause—Hutton had been conducting his operations with such equipment, and that

> In the absence of any limits in the certificate with respect to the type of vessels to be used in the performance of the transportation authorized, applicant would be free to extend its operations and perform services different from those performed by him on and since the statutory date [R. 12].

Hutton accepted the amended certificate without objection (R. 62).

Following Hutton's death, appellant applied for and received Commission approval of the purchase of that portion of Hutton's amended certificate which authorized operation on the Hudson River (R. 21–22). In approving the transfer, the Commission authorized appellant to perform "the water-carrier service heretofore authorized" under Hutton's amended certificate of March 7,

1944 (R. 22), and found that the transfer of the certificate, insofar as it permitted such operations, was "consistent with the public interest" (R. 21). Appellant was issued a new certificate on February 5, 1948 (R. 27, 56).

Cornell Steamboat Company ("Cornell") is a common carrier by water certificated to perform towage on the Hudson River (R. 23).[2] On May 11, 1949, Cornell complained to the Commission that appellant's tariff I. C. C. No. 2, which became effective on April 17, 1949, embodied rates which contemplated the service of *towage,* and that the performance of such service violated appellant's certificate which authorized only the service commonly referred to as *freightage* (R. 28). By letter dated September 19, 1950, the Commission's Bureau of Water Carriers and Freight Forwarders informed appellant that, in view of the Commission's decision in ***Dixie Carriers, Inc., Rates and Allowances,*** 278 I. C. C. 417 (1950), it appeared that the service contemplated under the tariff would constitute towage, and that inasmuch as appellant was not authorized to engage in such service, the performance thereof would be unlawful (R. 28). On September 25, 1950, appellant replied that it intended to conduct its operations in conformity with the Commission's determination in the *Dixie* case when the order

[2] See *Cornell Steamboat Co. v. United States,* 321 U. S. 634.

therein became effective (R. 28).[3] The order in the *Dixie* case became effective on December 26, 1950.

On January 5, 1951, appellant filed a petition with the Commission, requesting formal determination whether the operations conducted by appellant pursuant to its aforesaid tariff constituted *freightage*, a service which it was authorized to perform, or *towage*, a service not in terms authorized by its certificate (R. 23).[4] A full adminis-

[3] In the *Dixie* case, operations substantially similar to those contemplated by appellant's tariff were held to exceed the authority conferred by a similar certificate.

[4] In its petition appellant asked for an opportunity to show that its operations were distinguishable from those in the *Dixie* case (R. 29). Moreover, during the hearing appellant's counsel conceded that the certificate acquired by appellant granted no towing rights. Thus, the following colloquy took place between the examiner, Mr. Curry (counsel for Cornell) and Mr. Wilson (counsel for appellant):

"Mr. CURRY. It is my understanding that it is admitted by the petitioner that the amended certificate which it has received under this transfer under this transfer authority does not include the right to perform towage.

"Mr. WILSON. That is true, Mr. Curry. It includes the right to operate as a common carrier in the transportation of general commodities, with the use of non-self-propelled vessels and separate towing vessels.

"Mr. CURRY. That is my understanding. Thank you.

"Exam. KONIGSBERG. And it is your position that that type of service performed is not towage but freightage?

"Mr. WILSON. That is right, and that the allowances published in the tariff are fully authorized and just and reasonable under Section 314, and so forth" (Tr., Ex. 7, pp. 9–10).

In addition to its petition for an interpretation of its authority, appellant filed with the Commission (1) an appli-

trative proceeding was then conducted by the Commission. This included a hearing in which all interested parties participated, the preparation of a proposed report and order by the examiner, and the filing of exceptions and replies thereto (R. 23).

On October 18, 1951, the Commission issued its report and order finding that appellant had been and was performing the service of towage without appropriate authority (R. 22–32). The Commission pointed out that carriers whose certificates do not "specifically authorize" them to perform towage cannot do so (R. 32). It carefully reviewed the facts relating to appellant's operations (R. 27–32), and concluded that the particular services performed "in connection with the movement of freight in shipper's scows constitutes a towage service" which appellant's certificate did not authorize it to perform (R. 32).

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cation for temporary authority, pursuant to Section 311 (a) of the Act, to perform general towage between points along the Hudson River; (2) an application under Section 5 of the Act to purchase the Hudson River towage rights of L. B. Shaw, Inc.; and (3) an application under Section 309 (e) of the Act for a certificate of public convenience and necessity authorizing it to engage as a common carrier in the performance of general towage on the Hudson River. By order dated January 31, 1951, the Commission denied appellant's application for temporary authority on the ground that appellant had failed to satisfy the requirements for the issuance of such authority. The remaining applications were pending before the Commission at the date of the issuance of the order under review (R. 29). They have since been denied (R. 64).

The Commission accordingly ordered appellant to cancel the rates, charges, and allowances involved (R. 33). A petition for reconsideration was denied by the Commission on March 17, 1952 (R. 34).

Appellant then filed the instant action in the court below to enjoin enforcement of the Commission's order (R. 1). On September 15, 1952, the court unanimously affirmed the Commission's order and dismissed appellant's complaint (R. 59–71). The court (per Clark, J.) held that the distinction between freighting and towing drawn by the Commission in issuing certificates was a "just and reasonable classification of groups of [water] carriers" under Section 304 (c) of the Act (R. 65–70); that the Commission could correct by amendment the "obvious legal ambiguity" of the original Hutton certificate which, "although in form general, was nevertheless expressly based on a finding of more limited grandfather rights" (R. 65); that since neither Hutton, at the time of the amendment of the original certificate, nor appellant, at the time of the transfer, had raised any objection to the amendment, they must be deemed to have acquiesced therein (*ibid.*); that appellant's present attempt to expand its grant was "an obvious afterthought simulated [*sic*] by the exigencies of its competition with Cornell" (*ibid.*); and that, so far as the operations covered by the disputed rates are concerned, the evidence demonstrated

that appellant received shippers' scows "as part of a consignment to be towed" and did not use them as part of its own equipment; and that consequently these operations constituted towage and not freightage (R. 64).

SUMMARY OF ARGUMENT

I

The Interstate Commerce Act, Part III, authorizes the Commission to specify the type of service which a certificated carrier may perform. Section 309 (d) not only permits the specification of routes and ports to be served, but provides additionally that the Commission may attach "such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part * * *." Congress recognized the historical differences between various types of water service and clearly intended, when it adopted the "grandfather" provisions of Section 309, that there would be a "substantial parity between future operations and prior bona fide operations". *Alton R. Co.* v. *United States,* 315 U. S. 15, 22; *Barrett Line Inc.* v. *United States,* 326 U. S. 179, 193, 200. The powers conferred by Section 309 must also be read in conjunction with Section 304 (c), which authorizes the Commission to establish "just and reasonable classifications of groups of carriers * * * as the special nature of the services performed * * * shall require".

The Commission's settled practice, from the inception of the Act, has been to specify the kind of service to be performed. This practice, while not directly passed upon by the courts, has been implicitly recognized and approved. The dictum in *United States* v. *Seatrain Lines,* 329 U. S. 424, 431, upon which appellant relies, does not deny the Commission's power to limit the type of service, but merely states that the matter is not free from doubt. This statement must be viewed against the factual background of the particular case. The facts of the instant case, as indicated in Point II A, are sharply distinguishable.

If the Commission's practice were overturned, serious practical difficulties would ensue. Thus, it would become difficult, if not impossible, to strike a balance between the public need for water transportation of a particular type and the avoidance of unnecessary and destructive competition in other areas of the industry. The administrative practice, which has aimed at achievement of this balance, has been frankly reported to Congress and has had its continued acquiescence.

II

A. The Commission's amendment, in 1944, of Hutton's original 1942 certificate did not prevent the conduct of any operations which Hutton had been theretofore conducting. It was for the sole purpose of making the certificate conform to the operations which had been performed during

the "grandfather" period. The removal of an ambiguity in a certificate is within the compass of the powers conferred by Section 309 (d).

In any event, Hutton consented to the 1944 amendment and took none of the steps prerequisite to judicial review of the Commission's action. When appellant applied for transfer of Hutton's authority, in 1947, it sought no more than the authority conferred by the then outstanding amended certificate. It did not suggest until 1951 that the 1944 amendment was improper. Appellant stands in no better position than its predecessor in interest, *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74, and may not be heard to attack, either directly or collaterally, the certificate which conferred upon it the exact authority which it sought and pursuant to which it has been operating over a period of years.

B. Freightage involves the provision of the complete transportation service; towage consists of supplying the motive power by which vessels are towed. The Commission has recognized this distinction in service, and has consistently used the words which appear in appellant's certificate—"the transportation of commodities generally by non-self-propelled vessels with the use of separate towing vessels"—as words of art connoting authority to perform freightage. Where the carrier's "grandfather" operations covered both freightage and towage, the certificate has also included the words "by towing vessels in the per-

formance of general towage." This consistent construction of its certificates by the Commission is entitled to substantial weight. *United Truck Lines* v. *Interstate Commerce Commission,* 189 F. 2d 816, 817 (C. A. 9), certiorari denied, 342 U. S. 830; *cf. United States* v. *American Trucking Associations,* 310 U. S. 534, 549. The Commission intended to and did limit appellant's predecessor to a freightage service when it used these words of art in the amended certificate.

III

A carrier engaged in freightage may use shippers' scows, provided they are used as part of its own equipment. But if the scows are received as part of the consignment to be towed, then the carrier is engaged in towage. The record fully supports the Commission's finding that appellant received shippers' scows as part of the consignment to be towed, and that appellant consequently performed towage service in connection with the movement of such scows. The tariffs contemplating the performance of such operations were properly cancelled.

ARGUMENT

I

THE COMMISSION HAS AUTHORITY TO SPECIFY THE TYPE OF SERVICE WHICH A WATER CARRIER MAY PERFORM

Pursuant to Commission approval, appellant purchased a certificate which authorized a par-

ticular type of operation. However, it now questions (Br. pp. 32–40) the basic statutory authority of the Commission to specify the service to be rendered or the type of equipment to be used by a water carrier.[5] It points out, in this connection, that, unlike Section 208 (a) of the motor carrier provisions of the Act, Section 309 (d) fails to provide that the Commission shall specify in a certificate issued by it the service to be rendered. We submit, however, that Section 309, read as a whole, and read together with other provisions of Part III, compels a conclusion contrary to that urged by appellant.

Section 309 (d) in terms requires only that the certificate specify the routes and ports to be served by the authorized carrier. But it is certainly not inferable that the Commission may do no more, for the Section goes on to declare that the Commission may attach "such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those

[5] We would call particular attention to the fact that the words of limitation found in appellant's certificate were in Hutton's certificate when appellant sought a transfer of Hutton's authority, and that appellant made no effort to have the words altered or eliminated. See Point II A, *infra*. While it would accordingly seem doubtful that appellant has standing to challenge the Commission's inclusion of such words of limitation, we nonetheless state our reasons for believing that the Commission is authorized to specify the kind of service which a water carrier may perform.

established by the Commission pursuant thereto." This is followed by a proviso declaring that no term or condition "shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require * * *." This proviso plainly means that the Commission shall not place a quantitative limit or ceiling on the amount of authorized equipment or the amount of authorized service which the carrier may provide. See *American Trucking Associations* v. *United States*, 344 U. S. 298, 316. It fairly implies that the Commission may define the scope of the certificate, including the character of service to be provided thereunder.[6]

This view is confirmed by consideration of the policies reflected in Section 309 (a), which contains the so-called "grandfather" provisions. As is evident from a reading of that section, the

[6] The legislative history of Section 309 (d) sheds little light on the question of the Commission's power to specify the character of service. The Committee report states simply that the proposed certificate provisions "are similar to sections 206, 207, and 208 of the Motor Carrier Act." S. Rep. 433, 76th Cong., 1st Sess., p. 27. The use of the words "trade or trades," in addition to the words "route or routes," in earlier versions of proposed Section 309, appears to be without significance since both sets of terms have a physical or geographical connotation in the water transportation field. As stated by Senator Wheeler, sponsor of the legislation, these words were designed "to cover irregular route operations * * *" [79 Cong. Rec. 10741].

Congressional purpose was to provide that carriers which had been furnishing a service prior to January 1, 1940, and continuously thereafter, might obtain a certificate without a showing of public convenience and necessity. When Congress adopted this provision, it was certainly well aware that historically water carriers have performed various distinct types of operations. See *Sacramento Navigation Co.* v. *Salz*, 273 U. S. 326, 328; *Stevens* v. *The White City*, 285 U. S. 195, 200.[7] Clearly, it was not intended that a carrier which had performed a particular service during the "grandfather" period was to be enabled, notwithstanding the lack of a showing of public convenience and necessity, to undertake operations of a character other than those performed during the critical period. The policy is precisely the same as that reflected in the comparable "grandfather" provisions incorporated in Part II. As this Court stated in *Alton R. Co.* v. *United States*, 315 U. S. 15, 22, a motor carrier case, the "grandfather" clause contemplates "substantial parity between future operations and prior bona fide operations." See *Barrett Line Inc.* v. *United States*, 326 U. S. 179, 193, 200, a water carrier case stating that the same policy is applicable in

[7] The nature and history of the long-established distinction between towage and freighting operations is discussed under Point II B, *infra*, pp. 35–41. Note, also, that the Act itself refers to various types of water carrier service, including floatage, car ferry, lighterage, and towage. Section 303 (f). See, also, note 9, *infra*.

cases arising under Part III. If that policy were ignored by the Commission and "grandfather" carriers permitted to expand the character of their operations, the Commission would be disabled in the performance of its duty, under the certification provisions of the Act, to avoid unnecessary duplication of facilities and services and to minimize destructive competition. See *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, 241; cf. *Crescent Express Lines* v. *United States*, 320 U. S. 401, 409.

From the outset, the Commission, in administering the "grandfather" provisions of Part III, has taken the position that an applicant must be restricted to the kind of service previously performed. Thus, in the early case of *A. L. Mechling Barge Line Common Carrier Application*, 250 I. C. C. 77, 78 (1941), it was started:

> Applicant furnishes transportation by barge, and we will limit his service to that type of operation. Classification of carriers in terms of their type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights

of water carriers subject to part III of the act.

* * * * *

We find that applicant was in bona fide operation on January 1, 1940, as a common carrier by non-self-propelled carrying vessels * * *[8]

The district court observed in the instant case (R. 69–70):

> We agree with the Commission that it cannot carry out the purpose and intent of Part III if such indefinite expansion as contemplated by the plaintiff is allowable against the Commission's finding of a public interest to the contrary. Specifically there will be set at naught the intent of the grandfather clause, as defined by the Court in the provisions as to motor-carriers. *Crescent Express Lines* v. *United States*, 320 U. S. 401; *Noble* v. *United States*, 319 U. S. 88. Even though these cases may not be complete precedents for the reasons stated in the *Seatrain* case, yet they do state the use of the grandfather clause to preserve "the position which the carrier had obtained in the nation's transportation system." *Noble* v. *United States, supra*, 319 U. S. at page 92. Here Cornell and Hutton had operated without friction apparently for generations in their respective spheres on the Hudson; it would be indeed

[8] See, also, discussion, *infra*, pp. 24–26, 35–39. Note, also, that the *Mechling* decision was promptly brought to the attention of Congress (*infra*, pp. 26–29).

> ironical if under cover of an act designed to preserve that parity, plaintiff was enabled to upset it quite completely.

If the Commission's settled practice in limiting a water carrier's authority to the bona fide operations performed during the "grandfather" period were overturned, the terms and conditions of scores of certificates would be nullified.

Likewise significant in determining the Commission's power to specify the character of service which a carrier may perform is Section 304 (c), which states that the Commission may establish

> * * * just and reasonable classifications of groups of carriers included in the terms "common carrier by water," or "contract carrier by water," *as the special nature of the services performed by such carriers shall require;* and such just and reasonable rules, regulations, and requirements consistent with the provisions of this part to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest. [Emphasis added.]

In this section, Congress clearly recognized that common carriers by water perform various distinct types of services.[9] It would be anomalous,

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[9] Commenting on this Section, Senator Wheeler, a sponsor of the legislation, stated (79 Cong. Rec. 10739):

"Paragraph (c) is of great importance. It enables the Commission to classify interstate common carriers and interstate contract carriers by water in special groups and to vary the regulatory requirements as to rates, accounts, re-

indeed, to hold that the Commission is empowered to define the essential differences between various types of water carrier services for purposes of rule-making, but is required to ignore these very same distinctions in conferring authority under the certificate provisions of the Act. As the Commission pointed out in *Norfolk, Baltimore and Carolina Line, Inc., Ext.-James R.*, 265 I. C. C. 247, 254 (1947).[10] Sections 304 (c) and 309 (d) must be read together:

> The Commission's authority to specify the type of vessels to be used is contained in sections 304 (c) and 309 (d) of the act. Section 304 (c) provides that the Commission may establish such just and reasonable classifications of water carriers as the special nature of the service performed by such carriers shall require; and section 309 (d) provides that there shall be attached to the exercise of the privileges granted by a certificate such reasonable terms, conditions, and limitations, as the public convenience and necessity may from time to time require. In the exercise of this au-

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ports, and other matters in accordance with the nature of the services rendered and the public need. Water transportation is a more varied form of transportation than rail and adjustments of the regulation and flexibility in its administration to satisfy special conditions will enable the Commission to avoid imposing unnecessary burdens upon the carriers. It is to the interest of carriers, shippers, and the public that this paragraph be retained."

[10] On the point under discussion, this decision was affirmed by the entire Commission, 265 I. C. C. 313.

thority the Commission uniformly has classified water carriers and limited their operating rights in accordance with the type of vessels to be operated. *Erie & St. Lawrence Corp. Contract Carrier Application*, 250 I. C. C. 767, 780, and the Commission's report on reconsideration therein, 260 I. C. C. 235, 237–238.

If, as we contend, the Commission is authorized to define the character of service to be performed by language of limitation incorporated in the carrier's certificate, then it needs no argument that it may do so in any appropriate manner, for example, by describing the type of equipment to be used. This method of definition, frequently employed in motor carrier as well as water carrier certificates, has been expressly approved by this Court. *Crescent Express Lines Inc.* v. *United States*, 320 U. S. 401, 408–410.

Applicant places considerable reliance upon a dictum of this Court in *United States* v. *Seatrain Lines*, 329 U. S. 424, 431. This dictum, it should be stressed, does not declare that the Commission is barred from specifying the kind of service which a carrier may perform. The Court's statement was to the effect that the Commission's power, in issuing an original water carrier certificate, to limit the type of service to be rendered is not "free from doubt" (p. 431).

There should be noted, at the outset, certain basic differences between the *Seatrain* case and

the instant case. In *Seatrain*, the Court found that the original certificate issued to the carrier was in conformity with the operations performed during the "grandfather" period, and that the subsequent amendment of the certificate, promulgated over Seatrain's vigorous and timely objections, constituted a drastic limitation tantamount to an unauthorized revocation (pp. 429–33). It was also noted by the Court (p. 428) that the district court had found that Seatrain had expended large sums in reliance upon the original certificate.

In the instant case, Hutton's original certificate was amended in 1944 so that Hutton would not be free to extend his operations "and perform services different from those performed by him on and since the statutory date" (R. 62). As Judge Clark emphasized (*ibid.*), in any event Hutton accepted the new certificate without question or formal objection. The appellant, moreover, did not come into the picture until 1947, when it applied for transfer of the certificate then outstanding in Hutton's name. In the transfer proceeding, it made no objection whatever to the language incorporated by virtue of the earlier amendment. Accordingly, as we shall point out more fully under Point II A, *infra*, appellant's authority, unlike Seatrain's, has been nowise altered, amended, or revoked. Appellant got precisely what it applied for and was on full

notice as to what it was getting at the time of the transfer.

Moreover, we respectfully suggest that this Court's expression of doubt in the *Seatrain* opinion was not meant to have the sweeping significance which appellant would attribute to it. The Court stated, it is true, that the Commission's power to limit a water carrier to a certain type of service was open to question. But the Court then had before it a case in which the Commission had first conferred authority to transport commodities generally (see 329 U. S. at 426) and later amended the certificate in a manner which the Court concluded (p. 427) deprived the carrier of that right. It is against this background that the statement must be read. One can scarcely believe, however, that the Court's comment means that there was no initial power to restrict Seatrain to the movement of commodities generally. Can it be seriously suggested, for example, that Seatrain is now free, notwithstanding the fact that its certificate authorizes only the carriage of general commodities, to assert the right to haul passengers as well as freight?

Water carrier certificates invariably carry limitations other than merely geographical ones.[11] In the *Seatrain* case, the original certificate, which

[11] See discussion of certificates relating to freighting and towing operations, *infra*, pp. 35–39.

was restored to full potency when the Court struck down the attempted amendment, limited the carrier to transporting commodities with the use of self-propelled vessels. In *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U. S. 236, the appellee company challenged the Commission's action in certificating a competitor. The challenged certificate was narrowly confined to operations as a "common carrier in the transportation by water of motor vehicles" (p. 237). The Court's unanimous opinion, holding that the Commission's grant of authority to perform such service was supported by the evidence and findings, contains no intimation whatever that the limitation to the carriage of motor vehicles was in any sense improper. In *Warner* v. *United States*, 97 F. Supp. 580 (W. D. Tenn.), affirmed, 341 U. S. 907, the Commission had confined the appellant carrier to particular services and commodities. The district court sustained the Commission's order against the carrier's contention that the evidence required a broader grant of authority, and this Court summarily affirmed. In *Cornell Steamboat* v. *United States*, 321 U. S. 634, 637, the Court declared:

> Cornell is in active competition with *other types* of interstate water carriers as well as with trucks and railroads. Therefore, if *Cornell's particular method of providing water transportation facilities* for others is not subject to regulation under

> the Act, it would appear to present an anomalous exception to the Congressional plan for regulation of competing transportation activities. We conclude that the language of the Act brings Cornell's business within its coverage, and that to construe the Act otherwise would frustrate the purpose of Congress. [Emphasis added.]

Concededly, these cases do not explicitly discuss the Commission's power to define the character of service to be provided by the authorized carrier. Yet, it seems plain that they recognize it. Thus, the long-settled practice of the Commission, implicitly confirmed by the course of judicial decisions, supports the conclusion to which the statutory provisions point.

As already indicated, important practical considerations likewise support the Commission's construction of the Act. The purpose of Congress in requiring water carriers to obtain certificates of public convenience and necessity was to enable the Commission to strike a balance between the public need for water transportation and the elimination of destructive competition among water carriers and between water carriers and other forms of transportation. If the Commission, in issuing a water carrier certificate, cannot define and limit the service to be performed, it will be placed in an absurd dilemma. An applicant for a certificate may desire only to perform a freightage service, for example, and may dem-

onstrate that the public convenience and necessity requires additional freightage service on the particular waterway. Under the Commission's present practice, such a showing would warrant the grant to a qualified applicant of a certificate of public convenience and necessity limited to freightage, as in the instant case.

On the other hand, if the Commission may only issue a certificate unlimited as to the type of service to be performed, then the issues of the certificate proceeding will be broadened greatly. The Commission must consider in relation to public convenience and necessity and competitive consequences not only the precise service which the applicant presently desires to perform but also the other types of water carrier service in which he might later choose to engage under a certificate unrestricted as to type of service. As a result, the Commission may find it necessary to insist upon a far broader showing as to the need for additional service and the effect upon competition. Similarly, all existing common carriers on the particular water route, regardless of the type of service which they perform, will see a potential competitor in every applicant for a certificate, even though the latter actually desires to provide only a single type of water transportation. In brief, the result sought by appellant would place an unnecessary burden and expense upon every applicant for a new certificate by complicating and lengthening certificate proceedings.

It cannot be assumed lightly that Congress intended to place such a burden upon those who seek to become common carriers by water, and at the same time to require that every carrier with "grandfather" rights be issued a certificate permitting it to perform every type of common carriage without regard to its actual and historic position in the industry. Such a result, moreover, would go far in defeating the purpose of the certificate system in maintaining a system of water transportation balanced between the public need for adequate transportation and the protection of the carriers from ruinous competition.

Moreover, if "grandfather" certificates must be unlimited as to type of service, the transfer, pursuant to Section 312, of such an unlimited certificate from a small operator, such as Hutton, who has performed only a single type of service, to a carrier with larger resources and a desire to engage in wider operations, would completely alter the competitive conditions on a waterway.

In view of these practical considerations, it is not surprising that Congress, which has been fully informed concerning the Commission's policy, has acquiesced in it. In its annual report for the year ending October 31, 1942, the Commission advised Congress that:

> Because of the special nature of the services performed by different types of water carriers, division 4 found that proper administration required that it exercise the

> power under section 304 (c) to classify such carriers. The certificates and permits issued have limited the carrier to transportation by (1) self-propelled vessels, (2) sailing vessels, (3) non-self-propelled vessels with the use of separate towing vessels (barge-line services), (4) towing vessels, or (5) vessels furnished to persons other than carriers for use by such persons in the transportation of their own property (restricted to contract carriers by statutory definition in section 302 (e)). In some instances, a carrier has been authorized to perform more than one type of transportation.[12]

Again in 1944, the Board of Investigation and Research, created under Part I of Title III of the Transportation Act of 1940, in its report entitled *Federal Regulatory Restrictions Upon Motor and Water Carriers*, informed Congress that:

> In granting certificates and permits to water carriers under the "grandfather" clauses, the Commission restricts carriers to the type or types of equipment which they were operating on the "grandfather" date and up to the time it acted upon each application. As a result, each operating authorization limits a carrier to the use of self-propelled vessels or non-self-propelled vessels or towing vessels or sailing ships, or a combination of these different types of

[12] 56th Annual Report of the Interstate Commerce Commission, p. 141.

equipment. Division 4 justified this type of restriction on the following grounds:

"Applicant furnishes transportation by barge, and we will limit his service to that type of operation. Classification of carriers in terms of their type of operation assures the public that the same type of service will be continued by them. In this manner the competitive balance of types of carriers over the same route will not be disrupted by changes which they might make without first securing from this Commission the necessary certificates of public convenience and necessity. We will, therefore, as a general policy employ such a classification in defining the operating rights of water carriers subject to part III of the act."*

It is clear from this statement that the policy of restricting water carriers to particular types of equipment was adopted primarily as a means to control competition among water carriers operating different kinds of water-carrier equipment. It prevents operators of one type of equipment from engaging in transportation by means of another type of equipment without first obtaining permission from the Commission.[13]

* *A. L. Mechling Barge Line Common Carrier Application*, 250 I. C. C. 77, 78 (1941). See I. C. C. Annual Report, 1942, p. 141, for a statement on this policy.

[13] S. Doc. 78, 79th Cong., 1st Sess. (1945), pp. 264–265.

Similar information had already been furnished to Congress in a summary of this report.[14]

We submit that the Commission's interpretation of the Act in the only way which permits practical administration of the certificate system, and which has been unchallenged by the affected industry or by Congress for 11 years, should prevail over the mechanical comparison of Titles II and III of the Act which is the petitioner's sole reliance.

II

APPELLANT'S CERTIFICATE AUTHORIZES IT TO PERFORM ONLY A FREIGHTING SERVICE

A. APPELLANT'S RIGHTS ARE TO BE DETERMINED SOLELY ON THE BASIS OF THE LANGUAGE OF THE AMENDED CERTIFICATE

Appellant, seeking to escape the effect of the words of limitation contained in Hutton's certificate at the time of the transfer (1947), rests heavily on the proposition that the Commission's action in amending Hutton's certificate in 1944 was unauthorized (Br., Point I). To this, there are two answers. In the first place, we do not believe that the Commission's action in 1944 was unauthorized. But, secondly, even if the Commission's action were deemed unauthorized, appellant would be no better off. Hutton failed to challenge the amendment and could not have done so in 1947, the date when appellant first entered

[14] H. Doc. 637, 78th Cong., 2d Sess., p. 19. The summary of the report was published to the industry in 11 I. C. C. Prac. J. 818, 837 (June, 1944).

the picture. Obviously, appellant, which applied for transfer of the specific rights set forth in the outstanding certificate, stands in no better position than its predecessor. And it may not attack collaterally the certificate upon which its authority rests.

1. Hutton's original application was filed in 1941. The report of Division 4 (R. 7) did not find that the applicant had been engaged in moving shippers' scows, *i. e.*, in the service of towage. It found, on the contrary, that Hutton's operations had been performed as a common carrier of commodities (R. 8), rather than as a towor, and that Hutton had utilized his flotilla as a unit, *i. e.*, to perform a complete transportation service (freightage).[15] The certificate which Division 4 issued incorporated the report and ordered that the applicant be authorized to continue such operations, "subject, however, to such terms, conditions, and limitations as are now, or may hereafter be, attached to the exercise of such authority by this Commission" (R. 10).

In 1944, the Commission, on its own motion, ordered the Hutton application opened for reconsideration, and filed a report and amended certificate and order (R. 11–14). It pointed out that in its prior report it had failed to specify "the type of vessels to be used by applicant in the exercise of the authority granted" (R. 11).

[15] The distinction between "towage" and "freightage" is discussed, *infra*, pp. 35–36.

It described, as it had in the first report, the operations in which Hutton had been engaged on and since January 1, 1940 (R. 12). Stating that the failure of specification would leave Hutton "free to extend * * * operations and perform services different from those performed by him on and since the statutory date," Division 4 concluded that the certificate should be amended to permit

> * * * operation as a common carrier by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels, in interstate or foreign commerce, in the transportation of commodities generally between points in the area defined in our order of March 26, 1941 * * * [*ibid.*]

These words, as we shall point out under Point II B, are words of art which have a well-established meaning, a meaning which had been set forth in Commission reports and was well known to the industry at the time the amendment was effectuated; their effect is to limit a carrier to a freighting service.

There is no suggestion in this record and no contention made that the reports of Division 4 (R. 7, 11) inaccurately describe Hutton's operations. Unlike the situation in the *Seatrain* case, the amendment of the Hutton certificate left Hutton free to continue the operations in which

he had been theretofore engaged. The amendment was simply designed, in Judge Clark's words (R. 65), "to correct a certificate having the obvious legal ambiguity of the first Hutton certificate which, although in form general, was nevertheless expressly based on a finding of more limited grandfather rights." Cf. *Riss & Co., Inc.* v. *United States*, 100 F. Supp. 468, 474 (W. D. Mo.), affirmed, 342 U. S. 937, rehearing denied, 343 U. S. 937. The act of amendment, in these circumstances, was, we submit, an appropriate exercise of the power conferred by Section 309 (d) to attach to a certificate "such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require * * *."

2. But even were one to assume, for purposes of argument, that the amendment could have been successfully challenged by timely action on Hutton's part, the fact remains that it was not challenged, and no challenge, direct or collateral, can now be asserted by Hutton's successor.

"Hutton accepted the new certificate apparently without any question and certainly without any formal objection, either within the time permitted or otherwise" (R. 62). It is to be noted that the 1944 order issuing the amended certificate was promulgated by Division 4 (R. 13–14), and that an order of a division is reviewable only if an affected party has presented to the Commission, and the Commission has denied, a petition

for reconsideration (Sections 17 (9), 316 (a)). When Hutton failed to present a petition within the permissible time,[16] the order, as to him, became final and unchallengeable. See *United States* v. *L. A. Tucker Lines, Inc.*, 344 U. S. 33; *Holmes* v. *United States*, 89 F. Supp. 894 (S. D. N. Y.), affirmed, 339 U. S. 927. Certainly, appellant, coming into the picture in 1947 as Hutton's transferee, stands in no better position than its predecessor in interest. *Gregg Cartage & Storage Co.* v. *United States*, 316 U. S. 74; *Interstate Commerce Commission* v. *Moland Bros. Trucking Co.*, 62 F. Supp. 921, 923–4 (D. Minn.).[17]

It is also plain that appellant may not, in the guise of seeking an interpretation of the transferred authority, launch a collateral attack upon the certificate and do indirectly what it is precluded from doing directly.[18] It is to be emphasized, in this connection, that appellant sought to purchase the rights covered by the "amended cer-

[16] Except for good cause shown and upon leave granted, a petition to reconsider action taken on an application must be filed within thirty (30) days. *General Rules of Practice Before The Interstate Commerce Commission* (1942), Rule 101 (e); 49 C. F. R. 1.101 (e).

[17] Note, also, that where a certificate changes hands by virtue of a transfer or the acquisition of one carrier by another, the Commission is authorized to attach appropriate conditions. Section 312. And see *United States* v. *Rock Island Motor Transit Co.*, 340 U. S. 419.

[18] By a separate petition filed July 20, 1951 (Tr., Ex. 7), appellant requested the Commission to issue it a new certificate in the terms of Hutton's original certificate. Appellant has not sought judicial review of the Commission's order of July 7, 1952 (*ibid.*), denying this petition.

tificate dated March 7, 1944" (R. 15). As the report of the Commission on the transfer application makes plain (R. 15–21), appellant made no objection whatever to the language describing the scope of operating authority. Indeed, when an intervening competitor urged that the 1944 certificate which appellant sought was too broad, on the ground that Hutton had abandoned certain operations between 1941 and 1944, counsel for appellant insisted that the terms of the 1944 certificate were no longer subject to challenge. This is reflected in the report on the transfer application in which it is stated (R. 20):

> Counsel for the [transfer] applicants points out that the certificate may not be attacked collaterally in this proceeding, and contends that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation in whole or in part, citing *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424.

A fortiori, the terms of the 1944 certificate were not challengeable in 1951, when appellant, for the first time, suggested that there was a defect.[19]

[19] It is to be noted that appellant's petition, which instituted this proceeding, did not question the Commission's power to specify the nature of service to be performed by a water carrier. At that time, appellant sought only a determination as to the type of service covered by the language of its certificate. It was not until later in the proceeding, *i. e.*, subsequent to the filing of the examiner's report, that appellant, for the first time, questioned the Commission's authority. See Exceptions to Examiner's Report, filed June 18, 1951 (Tr., Ex. 7).

Appellant, having sought to purchase the authority set forth in the amended certificate, and having acquired that authority and obtained benefits thereunder, will not now be heard to say that words of limitation appearing in that certificate are to be ignored. *Alabama Power Co. v. Federal Power Commission*, 128 F. 2d 280, 293 (C. A. D. C.), certiorari denied, 317 U. S. 652; *Central Nebraska Pub. P. & I. Dist. v. Federal Power Commission*, 160 F. 2d 782, 784 (C. A. 8), certiorari denied, 332 U. S. 765.

B. THE WORDS IN APPELLANT'S CERTIFICATE DEFINING ITS OPERATING AUTHORITY ARE WORDS OF ART AUTHORIZING ONLY FREIGHTAGE, AND NOT TOWAGE

Appellant's certificate authorizes it to operate as a common carrier "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vessels." We submit that this language does not authorize appellant to conduct general towing operations, as it seeks to do (*infra*, pp. 42–43), but restricts it to the service commonly known as freightage.

The distinction between freightage and towage is well known in maritime law, and has been consistently recognized by the Commission in its administration of Part III of the Interstate Commerce Act. Freightage connotes the furnishing of the complete transportation service. The

carrier has full control over the vessels,[20] handles their loading and unloading, and assumes responsibility for the goods while in transit. Towage, on the other hand, is merely the "supplying of power by a vessel * * * to tow or draw another * * *," *Stevens* v. *The White City*, 285 U. S. 195, 200; cf. *Sacramento Navigation Company* v. *Salz*, 273 U. S. 326, 328.

In issuing certificates under the "grandfather" clause, the Commission has treated freightage and towage as distinct types of service or fields of operation, *Eastern Transportation Company Contract Carrier Application*, 250 I. C. C. 505, 508 (1942), and has specified whether the carrier was authorized to perform one or the other, or both. Where freightage was authorized, the certificate has used the words "by non-self-propelled vessels with the use of separate towing vessels."[21] Where towage authority was granted, the certificate has specified "by towing vessels [or tugboats] in the performance of general tow-

[20] The carrier itself usually furnishes the vessels, which it may own or lease. In some instances, however, the carrier may use the shipper's barges. *Cf. Campbell Transportation Company Common Carrier Application*, 260 I. C. C. 107, 110 (1943).

[21] *United Boat Lines Common Carrier Application*, 250 I. C. C. 81 (1941); *Choctaw Transportation Co. Contract Carrier Application*, 250 I. C. C. 106 (1941); *McLain Marine Corporation Common Carrier Application*, 250 I. C. C. 297 (1942); *McLain Carolina Line, Inc., Common Carrier Application*, 250 I. C. C. 327 (1942); *John J. Mulqueen Contract Carrier Application*, 250 I. C. C. 436 (1942).

age."[22] And, where the carrier's "grandfather" operations were found to cover both towage and freightage, the certificate has used both phrases, *i. e.*, "by non-self-propelled vessels with the use of separate towing vessels * * * *and* by towing vessels in the performance of general towage." [Emphasis added.][23] On December 14, 1943—almost three months before Hutton received his amended certificate—the Commission explicitly declared that this long-recognized distinction compelled the conclusion that "Authority to perform * * * towage is not included in the authority granted to water carriers to engage in the transportation of commodities by non-self-propelled

[22] *J. D. Orrell Contract Carrier Application*, 250 I. C. C. 67 (1941) ("by tugboats"); *John L. Goss Corp. Contract Carrier Application*, 250 I. C. C. 101 (1941) ("by tugboats"); *Moran Towing & Transportation Co., Inc., Applications*, 250 I. C. C. 541 (1942) ("by towing vessels").

[23] *James McWilliams Blue Line Inc. Common Carrier Application*, 260 I. C. C. 15 (June 24, 1943); *Tidewater Transp. Co. Common Carrier Application*, 260 I. C. C. 30, 31 (July 23, 1943), affirmed *sub nom. Inland Nav. Co.* v. *United States*, 76 F. Supp. 567 (E. D. Wash.); *Upper Mississippi Towing Corp. Common Carrier Applications*, 260 I. C. C. 85 (Sept. 15, 1943); *Campbell Transportation Company Common Carrier Application*, 260 I. C. C. 107 (1943); *Southern Transportation Co. Contract Carrier Application*, 260 I. C. C. 129 (1944); *Colle Towing Company Applications*, 260 I. C. C. 681 (1946); *Merene Company Applications*, 260 I. C. C. 689 (1946); *Cumberland River Sand Company Common Carrier Application*, 260 I. C. C. 734 (1946); *Baton Rouge Coal and Towing Co., Contract Carrier Application*, 260 I. C. C. 761 (1946); *American Barge Line Company Applications*, 260 I. C. C. 783 (1946).

vessels with the use of separate towing vessels." *Campbell Transportation Company Common Carrier Application, supra.*[24] That decision in the *Campbell* case was referred to by the Commission in several subsequent cases in which towage authority was specifically granted. *Central Barge Co. Applications*, 260 I. C. C. 329, 339 (1944); *Terrebonne Towing Company, Inc., Exemption*, 260 I. C. C. 551, 554 (1945); *Union Barge Line Corporation Applications*, 260 I. C. C. 563, 564 (1945).

Thus, the clear and consistent course of Commission practice has been to use the words "non-self-propelled vessels with the use of separate towing vessels" in a certificate as words of art granting authority to engage only in freightage. Long before appellant acquired Hutton's amended certificate in 1948, these words had acquired this

[24] Appellant argues that the *Campbell* case incorporated a new policy and overruled the Commission's earlier decision in *Eastern Transportation Company Contract Carrier Application*, 250 I. C. C. 505 (Br. 14–15, 18, 21, 43–44). The Commission's first decision in the *Eastern* case, on October 19, 1942, did not include a grant of authority to tow shippers' barges. Its report on reconsideration, on March 6, 1943, modified its prior decision and granted Eastern a new certificate specifically authorizing it to perform both freightage and towage (250 I. C. C. 635). Between the *Eastern* case on rehearing and the *Campbell* case there were at least three other cases in which the Commission issued certificates specifically authorizing both towage and freightage (see *supra*, note 24). Thus, the *Campbell* case enunciated no new policy, but followed the Commission's then well-settled practice of specifying both towage and freightage where the carrier was authorized to perform both services.

precise meaning in the trade.[25] Indeed, even prior to the issuance of Hutton's amended certificate in 1944, the Commission had stressed in the *Campbell* case, *supra*, that certificate authority to engage in transporation by non-self-propelled vessels with separate towing vessels did not authorize towage.

This consistent construction of its certificates by the Commission is, we submit, entitled to great weight. *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817 (C. A. 9), certiorari denied, 342 U. S. 830; *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503, 504 (S. D. N. Y.), affirmed, 324 U. S. 824; *cf. United States* v. *American Trucking Associations*, 310 U. S. 534, 549.

Appellant argues that by construing its certificate not to authorize towage the Commission is "reading into that certificate a classification [of water carriers] which is not referred to therein" (Br. 28). The short answer to this contention is that the very language of the certificate itself describes the service to be rendered, i. e., freightage, and limits appellant to such service.[26]

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[25] Appellant's authority to operate as a common carrier by "self propelled vessels" obviously does not authorize it to tow other vessels.

[26] The Commission's decision in *Coastal Tank Lines, Inc.* v. *Charlton Bros. Transp. Co., Inc.*, 48 M. C. C. 289, affirmed *sub nom. Coastal Tank Lines, Inc.* v. *United States*, — F. Supp. — (D. D. C. No. 2271–50, Feb. 10, 1953), which appellant cites in support of this contention, is not in point. In that

Equally without merit is appellant's contention that, by construing its certificate as limiting it to freightage, the Commission has modified or revoked Section 314 of the Interstate Commerce Act (Br. 40–47). That Section authorizes a carrier to make reasonable allowances to shippers who furnish a portion of the services or facilities involved in the transportation rendered. The invalidity of appellant's allowances, however, stems not from any unreasonableness as to amount, but from the fact that they were made in connection with a transportation service which appellant is not authorized to perform. As Judge Clark stated, Section 314 "obviously deals with lawful transportation; it does not override earlier sections to make that lawful which is unlawful" (R. 70). Appellant fully retains its rights to make proper allowances to shippers as long as it stays within its operating authority.[27]

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case the Commission held that a motor carrier's certificate to transport general commodities did not preclude it from transporting bulk petroleum products in tank cars, even though the Commission previously had classified the latter as a distinct type of service. The rationale of the decision was that general commodities encompassed petroleum products. In the instant case, however, appellant does not have authority to engage in general river transportation, but is limited by the terms of its certificate to freightage.

[27] Appellant's argument that the Commission's findings fail to meet the requirements of Section 8 (b) of the Administrative Procedure Act, 60 Stat. 242, 5 U. S. C. 1007, appears, as the court below noted, "to border on the frivolous" (R. 70). The Commission's report (R. 23–32) fully considers and rules upon all of the "material issues" tendered by ap-

In issuing Hutton's amended certificate, the mission found that on and since January 1, 1940, Hutton had been in operation "as a common carrier * * * by non-self-propelled vessels with the use of separate towing vessels (R. 12). Hutton's amended certificate used the identical language in specifying the service to be rendered (R. 13). Since the Commission's report in the original "grandfather" proceedings showed that Hutton had been performing a freighting service,[28] and since the Act contemplated that "grandfather" certificate authority was to be restricted to the service previously rendered, we submit that the Commission clearly intended to and did limit Hutton to a freightage service when it used the words "by non-self-propelled vessels with the use of separate towing vessels" in the amended certificate. Appellant, as Hutton's successor in interest, possesses no greater rights (see *supra*, pp. 32–35).

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pellant. The Commission specifically rejected appellant's contention that the allowances were invalid under Section 314, finding that in so far as they covered towage they were "published without authority" and consequently "unlawful" (R. 32). See *Emery Transportation Co.* v. *United States*, 91 F. Supp. 644, 646 (S. D. Ohio), affirmed, 339 U. S. 955.

[28] The Commission found that Hutton owned and managed one steam power boat and four barges, "all of which are operated as a unit;" and that on occasion he had rented or chartered other barges "for operation in applicant's fleet" (R. 7).

III

THE SERVICE PERFORMED BY APPELLANT IN CONNECTION WITH THE MOVEMENT OF FREIGHT IN SHIPPERS' SCOWS CONSTITUTES TOWAGE AND NOT FREIGHTAGE

We have previously pointed out that freightage involves the provision of the complete transportation service, whereas towage consists of supplying the motive power by which shippers' vessels are moved (supra, pp. 35–36). A carrier engaged in freightage may employ shippers' scows provided they are used as a part of its equipment. *Campbell Transportation Company Common Carrier Application*, 260 I. C. C. 107, 110; *Dixie Carriers, Inc., Rates and Allowances*, 278 I. C. C. 417, 423–424. But if the scows are received as part of the consignment to be towed, the carrier is rendering a towage service. *Ibid.* In the instant case the Commission found that appellant used shippers' scows under circumstances which "inescapabl[y]" showed that they were not a part of its own equipment (R. 32). This finding is fully supported by the record.

The allowances in the instant case are made to shippers who furnish scows for downstream transportation of bricks on the Hudson river (R. 28, 29). The scows are provided with a captain who is responsible to the shipper or scow owner, and is paid by him (R. 28). No bills of lading or shipping orders are issued covering the

goods carried in the scows (R. 31). Appellant may not transport the property of other shippers in the scows (*ibid.*), and is required to return the scows empty to the shipper upon completion of the downstream transportation (R. 29, 32). If appellant does not do so, he makes a further allowance (R. 29). Appellant's free time and demurrage rules are inapplicable when the shippers furnish the scows (R. 29, 32).[29] As the court below held, these facts "permit of no other" finding than that appellant receives the scows "as part of a consignment to be towed" and that it does not use them as "a part of its equipment" (R. 64). The Commission was plainly correct in finding that "the transportation performed by the petitioner [appellant] in connection with the movement of freight in shippers' scows constitutes a towage service" (R. 32).

[29] A water carrier who furnishes the complete transportation service is required to give shippers a reasonable period of free time (*i. e.*, without demurrage charges) to deliver and remove cargo from the loading area. *The Eddy*, 5 Wall. 481, 495.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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APRIL 1953.

APPENDIX

Part I of the Interstate Commerce Act, 24 Stat. 739 as amended, 49 U. S. C. 1 *et seq.*, provides, in pertinent part as follows:

> Section 17 (9):
>
> When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise.

Part III of the Interstate Commerce Act, 54 Stat. 929, 49 U. S. C. 901 *et seq.*, provides in pertinent part as follows:

> Section 304 (c):
>
> The Commission may establish from time to time such just and reasonable classifications of groups of carriers included in the terms "common carrier by water", or "contract carrier by water", as the special nature of the services performed by such carriers shall require; and such just and reasonable rules, regulations, and require-

ments consistent with the provisions of this part to be observed by the carriers so classified or grouped, as the Commission, after hearing, finds necessary or desirable in the public interest.

* * * * *

Section 309 (a):

Except as otherwise provided in this section and section 311, no common carrier by water shall engage in transportation subject to this part unless it holds a certificate of public convenience and necessity issued by the Commission: *Provided, however,* That, subject to section 310, if any such carrier or a predecessor in interest was in bona fide operation as a common carrier by water on January 1, 1940, over the route or routes or between the ports with respect to which application is made and has so operated since that time (or, if engaged in furnishing seasonal service only, was in bona fide operation during the seasonal period, prior to or including such date, for operations of the character in question) except, in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in subsection (b) of this section and prior to the expiration of one hundred and twenty days after this section takes effect. * * *

* * * * *

Section 309 (d):

Such certificate shall specify the route

or route over which, or the ports to and from which, such carrier is authorized to operate, and, at the time of issuance and from time to time thereafter, there shall be attached to the exercise of the privileges granted by such certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such other terms, and conditions, and limitations as are necessary to carry out, with respect to the operations of the carrier, the requirements of this part or those established by the Commission pursuant thereto: *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to its equipment, facilities, or service within the scope of such certificate, as the development of the business and the demands of the public shall require, or the right of the carrier to extend its services over uncompleted portions of waterway projects now or hereafter authorized by Congress, over the completed portions of which it already operates, as soon as such uncompleted portions are open for navigation.

* * * * *

Section 312:

Except as provided in this Part, any such certificate or permit may be transferred in accordance with such regulations as the Commission shall prescribe for the protection of the public interest and to insure compliance with the provisions of this part.

* * * * *

Section 314:

If the owner of property transported under this part directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be published in tariffs or schedules filed in the manner provided in this part and shall be no more than is just and reasonable; and the Commission may, after hearing on a complaint or on its own initiative, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order.

* * * * *

Section 316 (a):

The provisions of * * * section 17 of part I * * * shall apply with full force and effect in the administration and enforcement of this part.

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In The

Supreme Court of the United States

October Term, 1963

No. 468

THE ATLANTIC COAST LINE RAILROAD COMPANY,
Appellant,

vs.

THE STATE OF ALABAMA, INTERSTATE COMMERCE COMMISSION and CENTRAL OF GEORGIA RAILWAY COMPANY,
Appellees.

MOTION OF THE ATLANTIC COAST LINE RAILROAD COMPANY FOR ADVANCEMENT

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IN THE

Supreme Court of the United States

October Term, 1952

No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CORNELL STEAMBOAT COMPANY,
Appellees.

PETITION OF THE CALLANAN ROAD IMPROVEMENT COMPANY FOR REHEARING

Pursuant to the provisions of Rule 33(1) of the Revised Rules of this Court, appellant, The Callanan Road Improvement Company, files its petition for rehearing of the opinion and judgment of this Court delivered May 4, 1953.

That decision is based on the erroneous statement by the Court that appellant has "admitted for the purposes of this case that the limitations placed by the order of March 7, 1944 upon the original certificate issued to

Hutton in 1942 had the effect of restricting his operations to freightage and deny him the right to engage in tow age" (p. 5).

Appellant at no stage of the proceeding made any such admission but on the contrary, urged in its pleadings on brief and in argument, that Hutton's original certificate granted him the right to engage in all forms of related transportation including towing, and that the amended certificate of 1944 adding description of equipment was identical in effect with the original certificate. The amended certificate was not modified as to nature or type of operation on its transfer to appellant and at that time no attempt was made by either the Commission or the protestants to eliminate "towage" or to confine the certificate to freightage. The first time that appellant or its predecessors was subjected to any attempt on the part of the Commission to modify or restrict the original certificate or the amended certificate, was in connection with the construction of the tariff of the appellant currently in issue.

Because of the erroneous finding in the opinion that appellant has admitted restriction against engaging in towage in the amended certificate of March 7, 1944, the conclusion is reached that appellant is foreclosed from challenging constructions now placed by the Commission upon the 1944 certificate. The opinion suggests that there is some contradiction between appellant's position in the transfer proceedings of 1947 and its present position as to the Commission's power to modify the certificate. There is none. Appellant then and now asserts that the Commission's jurisdiction as exemplified in its orders cannot be attacked collaterally. We agree that "the appellant must take the certificate as it stood at the time it sought and received the Commission's approval for its

transfer." We do not dispute the Commission's power to issue the certificate in its present form and as it existed prior to the time the appellant sought its transfer. We do insist that the original certificate and the amended certificate under the decision of this Court in *United States* v. *Seatrain Lines*, 329 U.S. 423, 91 L.Ed. 396, granted appellant and its predecessors the right to move commodities generally as a common carrier with non-self-propelled vessels towed by self-propelled vessels without distinction between freightage and towage as these services were subsequently construed.

Since it appears that the majority of the Court at the time of decision was misled into believing that appellant had admitted that the change made by the order of March 7, 1944 had the effect of restricting his operations to freightage, it is understandable that it did not consider in its opinion the major issues in the proceeding, to wit, that the tariff upon which the Commission acted did not provide for towage but rather for freightage, and that the Commission cannot now in the guise of construing a tariff, revoke or modify the outstanding certificate of appellant without legislative authority.

CONCLUSION

This case was argued immediately following the conclusion of protracted argument in the Texas explosion case. There were numerous questions from the bench. The time was short for an appeal embracing so many administrative and jurisdictional issues and the Court had before it the opinion of the District Court which completely confused the presentation of fact and the positions of the parties. The effect of the opinion upon the appellant and, indeed, upon the authority of the Interstate Commerce Commission in its entire regulation of

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No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
A Corporation, South Bethlehem, New York,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CORNELL STEAMBOAT COMPANY.

REPLY BY CORNELL STEAMBOAT COMPANY, APPELLEE, TO PETITION OF THE CALLANAN ROAD IMPROVEMENT COMPANY FOR REHEARING

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Supreme Court of the United States

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No. 488

THE CALLANAN ROAD IMPROVEMENT COMPANY,
A Corporation, South Bethlehem, New York,
Appellant;

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION and CORNELL STEAMBOAT COMPANY.

REPLY BY CORNELL STEAMBOAT COMPANY, APPELLEE, TO PETITION OF THE CALLANAN ROAD IMPROVEMENT COMPANY FOR REHEARING

This reply by Cornell Steamboat Company to appellant's petition for rehearing, dated May 19, 1953, opposes the granting of such petition on the ground that it is inequitable and utterly without merit.

History of the proceeding shows appellant's contentions to be without merit. This Court (73 S. Ct. 803, 804) correctly shows that the "grandfather" application of Joseph R. Hutton, appellant's predecessor, was granted by order dated July 17, 1942, incorporating by reference the findings in the accompanying report that Hutton "owns and manages 1 steam power boat of about 240 horsepower, and 4 barges, all of which are operated as a unit. The power boat is used to tow the barges but also carries about 150

gross tons of freight. On occasion other barges are rented or chartered for operation in applicant's fleet". The authority granted was to operate "as a common carrier in interstate or foreign commerce, of commodities generally" on the waters specified. The indisputable conclusion by the Court is (p. 805):

> "Thus it will be seen that the Commission found the operations of Hutton to be those of a common carrier by water of commodities generally in self-propelled vessels which he owned and which he also used to tow barges he owned, rented, or chartered. *There is no finding that his operations included the towing of barges which he did not own, rent, or charter.*" (Emphasis supplied.)

The Court correctly points out that "The certificate was accepted by Hutton, and, as far as appears on this record, he operated under it until March 7, 1944 in the same manner as he had before".

The Court then points out that the Commission on March 7, 1944, amended the 1942 certificate, specifying the type of vessels to be used in the exercise of its authority theretofore granted. The Court said "This amended certificate, which limited Hutton to the identical operations he had long carried on and upon which his section 309 rights were authorized, was accepted by him without question, and he continued to operate under it until his death several months later".

By order, dated August 18, 1947, as the Court points out, transfer of the 1944 amended certificate to appellant was authorized by the Commission, and on February 5, 1948, an amended certificate was issued to appellant. The Court said "Thus, the appellant sought and received a transfer of the amended certificate of March 7, 1944, limited by consent as to waters to be operated upon".

The Court significantly states (p. 806) that Hutton had "accepted the modified certificate [of 1944] and operated under it, just as he had always operated", that "His operation was not cut down by the limitations placed upon the certificate", and that "The appellant, as transferee of that modified certificate, stands in no better position than Hutton stood". The Court further pointed out that in the transfer proceeding "the appellant objected that the protestant there could not raise the question of the Commission's power to modify the certificate, as this would be a collateral attack on the Commission's order". The Commission's report in the *Transfer case*, authorizing transfer of the 1944 Hutton certificate to appellant refers to appellant's contention (R. 20):

> "that the certificate may not be attacked collaterally in this proceeding, and * * * that when a certificate is finally granted, and the time for rehearing has expired, the certificate is not subject to revocation in whole or in part, citing *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424".

The Court states that in the present proceeding appellant seeks to do what it said could not be done, namely attack collaterally the 1944 order. The Court continued "It cannot in this collateral proceeding attack the validity of the Commission's order of March 7, 1944. * * * The appellant must take the certificate as it stood at the time it sought and received the Commission's approval for its transfer". The Court points out (p. 806):

> "The appellant cannot blow hot and cold and take now a position contrary to that taken in the proceedings it invoked to obtain the Commission's approval. If the appellant then had taken the position it seeks now, the Commission might conceivably have refused its approval of the transfer. The appellant accepted the transfer with the limitations contained in the

certificate. The appellant now will not be heard to say it is entitled to receive more than its transferor had or the certificate transferred gave".

The Court thus pierces the fallacies of appellant's contentions and bluntly exposes the inequitable and unsound character thereof.

Appellant's claim of lack of admission of freightage authority only. Appellant in its petition states "That decision [by the Court] is based on the erroneous statement by the Court that appellant has 'admitted for the purposes of this case that the limitations placed by the order of March 7, 1944, upon the original certificate issued to Hutton in 1942, had the effect of restricting his operations to freightage and deny him the right to engage in towage'" and that "Appellant at no stage of the proceeding made any such admission * * *".

As pointed out above by the Court, the original 1942 certificate, with the accompanying report of the Commission incorporated by reference, contained "no finding that his [Hutton's] operations included the towing of barges which he did not own, rent, or charter", and that "The certificate was accepted by Hutton". The 1944 certificate specified the type of vessels in the exercise of the authority granted, the authority being to operate "by self-propelled vessels and by non-self-propelled vessels with the use of separate towing vesssls * * * in the transportation of commodities generally" on the waters specified. This, as the Court pointed out, "limited Hutton to the identical operations he had long carried on" and "was accepted by him without question". This was the certificate that was transferred to appellant in the *Transfer case* in 1947 and which appellant insisted could not be collaterally attacked.

Neither Hutton nor appellant made any contention in the 1942, 1944, or 1947 proceedings that the carrier was

entitled to towage rights. It was recognized by numerous decisions of the Commission that the 1944 certificate included authority to perform freightage and not towage. (See this appellee's brief of March 31, 1953 pp. 25-33.)

That appellant knew that it had no towage rights under the 1944 certificate transferred to it and the 1948 certificate effectuating such transfer is shown by the later admission by appellant's counsel in the interpretation proceeding which led to the present court proceeding. At the hearing on February 23, 1951, counsel for appellant, who was counsel in the *Transfer case*, made the following admission (see appellee's brief of March 31, 1953, p. 23, and stipulation that the testimony before the Commission may be used):

> "Mr. Curry [counsel for Cornell]: It is my understanding that it is admitted by the petitioner [appellant] that the amended certificate which it has received under this transfer authority does not include the right to perform towage.
>
> Mr. Wilson [counsel for Callanan]: That is true, Mr. Curry. It includes the right to operate as a common carrier in the transportation of general commodities, with the use of non-self-propelled vessels and separate towing vessels.
>
> Mr. Curry: That is my understanding. Thank you.
>
> Exam. Konigsberg: And it is your position that that type of service performed is not towage but freightage?
>
> Mr. Wilson: That is right, and that the allowances published in the tariff are fully authorized and just and reasonable under Section 314, and so forth".

Moreover, as pointed out in appellee's brief the roundabout scheme resorted to by appellant of allowances to shippers furnishing their barges, instead of publishing a simple towage tariff, showed that appellant knew that it was restricted to freightage rights. Its filing of an application

for temporary authority to perform towage, an application to obtain a certificate of convenience and necessity to perform towage, and its application to acquire towage rights from another carrier all further indicate that it knew that its certificate is limited to freighting (brief, pp. 23-25).

Furthermore, the strenuous efforts made by appellant in the present proceeding to have the 1944 certificate set aside as an unauthorized amendment of the 1942 certificate is based on the assumption, and is an admission, that the 1944 certificate does not authorize towage. Appellant's whole argument as to claimed revocation is based on the allegation that the 1944 certificate curtailed the asserted broader scope of the 1942 certificate so as to limit the operation to freightage. The fact is, as recognized by the Court, that the 1944 certificate did not cut down Hutton's operation by the limitation in the certificate (p. 806), the operation being merely freightage and not towage.

Appellant's dissatisfaction with the Court's decision appears to be a continuation of its view that every one is out of step except appellant. The hearing examiner, Division 4 of the Commission, the entire Commission, the lower Court and this Court have held against appellant, after full and fair opportunity for it to present its contentions.

Appellant's contentions are not only inequitable and unsound but run counter to the long continued practice by the Commission under the certificate provisions of the Interstate Commerce Act and are against the best interests of the water carrier industry and the public served by it.

This appellee is limited in its certificate to towage. It is severely unjust that appellant should be permitted to cut across the authority of its certificate to perform towage

when such authority does not exist. The Court's decision that this cannot be done should not be disturbed.

Appellant's petition for rehearing should be denied.

Respectfully submitted,

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